The Central Law Journal.

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THE unsatisfactory character of the American system of transferring real estate, which is cumbersome, expensive and full of pitfalls, has called attention anew to the "Torrens system" of land transfers as it prevails in Australia. At the late meeting of the Illinois State Bar Association, a committee reported favorably upon that system, and urged its adoption in the State, as a measure which will save much expense in the transfer of titles, and give greater security thereto. The old plan of spreading all instruments affecting title to real estate upon a public record, has not proved entirely satisfactory, and the Torrens system is said to be an improvement in many other respects. In bold contrast to the system of transferring land, stands out the method by which stocks, bonds, and other kinds of personal property are assigned without any expense, and with less loss on account of incumbrance or failure of title than in the case of real estate. The remedy afforded by the Torrens plan is said to be in the adoption of a system of registry that resembles the old system of the transfer of vessels, which is done by the surrender of the old certificate of registration, and taking out a new one in the name of the owner. But we leave our readers to study it for themselves, as they will find its features interestingly stated in our leading article in this issue.

THE view of Judge Baker, speaking for the court in the Illinois case of Storey v. Adams, reported on page 160 of this issue, though doubtless supported by precedent, will hardly afford encouragement to wronged wives in that State, to obtain redress in the divorce courts. The gist of the decision was, that a wife who obtains a divorce from her husband upon the ground of his misconduct, though entitled to dower, may forfeit such right by the acceptance of a pittance allowed for alimony, which even is lost in case she remarries. The marital duties and obligations imposed upon the late Mr. Storey, whose wife sought in this proceeding, out of his estate, for the assignment of her dower, were thought by the court to be sufficiently discharged in the alimony decreed and accepted. To us it seems as though Mr. Storey, or rather his estate, has profited largely by his moral delinquency and misconduct, and that the wife would have been better off, at least from a financial point of view, had she winked at his transgressions and patiently awaited his death.

THE developments in the probate of the will, in New York, of the late Robert Ray Hamilton, whose experiences and death have been in the public mind for some time, furnishes the *New York Law Journal* with a text for a sermon on the subject of the looseness of the laws in relation to marriage, and the dangers which flow from the uncertainties of that law. Upon the death of Mr. Hamilton, his alleged widow made a claim before the New York surrogate for a portion of his estate, by virtue of a non-ceremonial marriage. But she was met with the difficulty that she must first disprove a former marriage, for, as will be readily understood, even though the non-ceremonial marriage might have existed, as it undoubtedly did, the fact that a former marriage existed which had not been annulled, would in itself be an unsurmountable obstacle to the claim of the alleged widow. And the decision of the surrogate was in effect that such former marriage did exist, as well as birth of a child therefrom. As the *New York Law Journal* very properly says, "if marriage were merely an ordinary contract, and governed by the general principles of law relating thereto, then, like any other contract, whether or not it existed, would be merely a question of proof. But, as has been repeatedly held by the courts, it is not only a contract very solemn in itself, with most important results as to the property rights of the parties, but it is a *status* which affects not only the parties themselves, but their offspring. Every conveyancer has been met, time and again, with the most vexatious uncertainty as to whether or not some grantor in the chain of title was married, and nothing is more troublesome than to have some alleged widow make her appearance, claiming a marriage perhaps some thirty or forty years before at some out of the way place." The subject seems to us, also, one for the interposition of legislators, and a system might be devised by which a wife should not be in a position to

claim rights in the real estate estate of her husband, unless some record of the marriage is made in the territory wherein the property is located.

NOTES OF RECENT DECISIONS.

MASTER AND SERVANT—NEGLIGENCE OF CO-EMPLOYEES—EMPLOYER'S LIABILITY ACT.—The Supreme Court of the United States, in the case of Chicago, M. & St. P. R. Co. v. Artery, 11 S. C. Rep. 129, consider a question arising under the Iowa Employer's Liability Act, which makes a company liable for injuries caused by the negligence or mismanagement of fellow-employees, "when such wrongs are in any manner connected with the use and operation of the railway, about which they shall be employed." The court held that a section-hand, injured by the fault of a fellow-employee, while returning home with the section crew upon a hand-car after repairing the track, is within the purview of the act, and entitled to recover. The court cites and discusses the cases of Deppe v. Railroad Co., 36 Iowa, 52; Schroeder v. Railroad Co., 41 Iowa, 344; Schroeder v. Railroad Co., 47 Iowa, 375; Pyne v. Railroad Co., 54 Iowa, 223; Smith v. Railroad Co., 59 Iowa, 73; Malone v. Railway Co., 61 Iowa, 326; Foley v. Railroad Co., 64 Iowa, 644; Malone v. Railway Co., 65 Iowa, 417; Luce v. Railroad Co., 67 Iowa, 75; Matson v. Railroad Co., 68 Iowa, 22; Stroble v. Railroad Co., 73 Iowa, 140; Nelson v. Railroad Co., 73 Iowa, 576; Rayburn v. Railway Co., 74 Iowa, 637, with a view to determining what facts constitute a direct connection with the use and operation of a railroad under the terms of the statute, and conclude that the injury in the present case was directly connected with the use and operation of the railway in whose common service the foreman and the plaintiff were.

STATUTE OF FRAUDS—MEMORANDUM—AUCTIONEER'S BOOK.—The Court of Appeals of New York, in the case of Mentz v. Newwitter, 25 N. E. Rep. 1044, decide that a statement in an auctioneer's book of land sold by him, which does not name the vendor, or give any description by which he can be identified, is not a sufficient "note or memorandum," to comply with the statute of frauds. The court cite the following American cases as sustaining the doctrine: Coddington v. Goddard, 16 Gray, 436; Sanborn v. Flagler, 9 Allen, 474; Waterman v. Meigs, 4 Cush. 497; Nichols v. Johnson, 10 Conn. 192; Sherburne v. Shaw, 1 N. H. 157; Brown v. Whipple, 58 N. H. 229; Webster v. Ela, 5 N. H. 540; Lincoln v. Preserving Co., 132 Mass. 129; Grafton v. Cummings, 99 U. S. 100; Knox v. King, 36 Ala. 367; Bailey v. Ogden, 3 Johns. 399; Clason v. Bailey, 14 Johns. 484; Church v. Bigelow, 16 Wend. 28; Calkins v. Falk, 39 Barb. 620; Wright v. Weeks, 25 N. Y. 159; Drake v. Seaman, 97 N. Y. 230.

NUISANCE — NOXIOUS ODORS — FACTORIES AND SLAUGHTER HOUSES—DAMAGES.—Two recent cases on the subject of nuisance are of sufficient interest to demand a passing notice. One case is Susquehanna Fertilizer Co. v. Malone, 20 Atl. Rep. 900, decided by the Court of Appeals of Maryland, where it was held that a fertilizer factory, from which noxious gases escape onto the premises of an adjoining land-owner in such quantities as not only to affect his family's health, and at times to oblige them to abandon the house, but also to materially injure the property itself, is a private nuisance to such land-owner, for which an action will lie, though the business may be lawful and useful, and though the best and most approved appliances may be used in its conduct and management. Whether or not the location of the factory is convenient and proper for carrying on the business, and whether or not such use of the property is reasonable, are not proper questions to be submitted to the jury, as, in the eye of the law, no place can be convenient for the carrying on of a business which is a nuisance, and which causes substantial injury to the property of another, nor can any use of one's own land be reasonable which deprives an adjoining owner of the lawful enjoyment of his property. The fact that defendant operated the factory for several years before the adjoining land-owner erected a house on his premises, is no defense to an action for the maintenance of the nuisance, where such operation has not been continued for a period long enough to give defendants a prescriptive right. The fact that large sums of money have been expended in the neighborhood in

the erection of similar factories cannot affect plaintiff's right to recover for the injuries caused by the operation of defendant's factory.

The other case is Ballentine v. Webb, 47 N. W. Rep. 485, decided by the Supreme Court of Michigan, which was a suit to enjoin defendant from maintaining a nuisance by carrying on a slaughter-house in the vicinity of complainant's residence. It appeared that when the business was established the region was comparatively uninhabited, and most of the residences had been erected since then; that other slaughter-houses and stock-yards were in operation within a short distance, and that a railroad ran near it. It was held that a slaughter-house, although it caused some discomfort, did not constitute a nuisance in such a neighborhood, independently of the manner in which it was carried on. The noise made by hogs, kept in confinement for the purpose of slaughter, being to some extent unavoidable, does not constitute such a nuisance as would justify equity in destroying defendant's business in order to abate it.

COMMON CARRIERS—STREET RAILWAYS—RIGHT OF EMINENT DOMAIN.—The question, whether statutes authorizing the condemnation of land for right of way, applies as well to street railways propelled by electricity, as to railroads propelled by steam, came before the Supreme Court of Oregon in Thomson-Houston Electric Co. v. Simon, 25 Pac. Rep. 147. The court held that common carriers are classified as carriers of goods and carriers of passengers, because their employment is *quasi* public, and the public have an interest in the faithful performance of their duties. The provisions of the statute for the condemnation of a right of way have little or no reference to corporations operated as street railways propelled by electricity or horse-power for local convenience, and the transportation of passengers, and do not authorize such to condemn private property for a right of way.

FRAUDULENT CONVEYANCE—CHATTEL MORTGAGE—VOID IN PART.—The case of Hayes v. Westcott, 8 South. Rep. 337, decided by the Supreme Court of Alabama, should be read in connection with the case of Van Raalte v. Harrington, which appeared in our last issue, both bearing on the subject of the rights of grantees in fraudulent conveyances. In the present case, it was held that in the absence of an actual fraudulent intent by a chattel mortgagee to assist the mortgagor in defrauding his creditors, the mortgage covering a stock of goods and fixtures, though constructively void as to the stock, under Code Ala., § 1730, by reason of the mortgagor's right to continue in possession and sell the goods, is valid as to the fixtures, to which the power of sale does not apply. The court discusses the question upon authority and upon principle as to whether the fact that a mortgage is constructively fraudulent on its face, with respect to the goods, avoids it *in toto*, a question upon which the authorities are numerous and in irreconcilable conflict. Some courts have held, without qualification, that the infirmity as to one item of property infects and vitiates the entire grant. Hyslop v. Clark, 14 Johns. 464; Russell v. Winne, 37 N. Y. 591; Burke v. Murphy, 27 Miss. 167; Sommerville v. Horton, 4 Yerg. 541; Claflin v. Foley, 22 W. Va. 434. Other courts have ruled that such a conveyance is good as to that part of its subject-matter with respect to which no benefit is reserved and no trust is created. State v. Tasker, 31 Mo. 445; State v. D'Oench, *Id.* 453; Donnell v. Byern, 69 Mo. 468; Henderson v. Hunton, 26 Gratt. 926; Barnet v. Fergus, 51 Ill. 352; U. S. v. Bradley, 10 Pet. 343. The court being left to choose between the two doctrines, on principle, unfettered by adjudication of its own State, conclude that a conveyance, in the absence of the infection of actual fraud, is bad to the extent only of the property out of which a benefit is reserved to, or a trust created to the use of the grantor; and that creditors have nothing to complain of, with respect to the disposition of the remainder, since it does not hinder, delay or defeat them in any legal sense, unless that disposition was in the effectuation of an actual or necessarily imputed evil intent which taints the whole transaction with actual fraud.

The court of appeals of New York in People v. Flack hold that a conspiracy to do an act which may be unlawful, followed by the doing of such act does not constitute the crime of conspiracy, unless the jury find that the parties were actuated by a criminal intent. The question of intent must always be submitted to the jury.

AUSTRALIAN SYSTEM OF LAND TRANSFER.

That the Australian ballot is a great advance—an added prop to the stability of popular government, and of peculiar benefit to America, has been demonstrated to a certainty. Another step the Australians have taken, and which it is intended to briefly outline, is of even greater importance, and equally adaptable to our institutions.[1] Lord Chief Justice Coleridge, in speaking before the Law Amendment Society of Cheltenham, England, in 1872, gives his testimony to its excellence in these positive terms:

"I have never been able to perceive the obstacle of applying to land the system of transfer which answers so well when applied to shipping; but as my learned brethren, one and all, have declared that to be impossible, I had become impressed with the belief that there must be something wrong in my intellect, as I failed to perceive the impossibility. The remarkably clear and logical paper which has been read by Sir Robert Torrens relieves me from that painful impression, and the statistics of the successful working of his system in Australia amount to demonstration; so that the man who denies the practicability of applying it might as well deny that two and two make four."

In England proper, except in the counties of Middlesex and Yorkshire, there is, strictly speaking, no such thing as registration of deeds, and even in these counties registration carries with it no constructive notice. Indeed in no country save the United States, does registration give constructive notice. Though for many years the Australian system (popularly known as the "Torrens Title"), has been discussed by parliament, English conservatism has blocked the way to its thorough adoption, and though it has been recognized in Ireland and Scotland, it has been adopted in such a mangled form as to make it of but partial value. In the meantime it has been adopted in all its perfection in Prussia, and has been in force there since 1872, as well as in Bavaria and other European countries. It has been applied in Ontario, Manitoba and British Columbia. In Hamburg, registration of title has been in vogue for over six hundred years, and Torrens derived many valuable suggestions from the Hamburg system.

The Australian act was the result of the work of Sir Robert Torrens, Bart, formerly a custom house clerk at Adelaide, South Australia. Becoming impressed about the year 1850 or 1851 with the idea that a new, simplier and more certain method for the transfer of land might be invented than the old English practice of conveyancing then in vogue, he, although not a member of the legal profession, by his untiring energy and perseverance, and in the face of many difficulties, succeeded in getting passed the act which came in operation in 1856. He was appointed register general, superintended the working of it, and made the system a success. The chief benefit of the system was the indefeasibility of the title obtained, together with the speed and certainty of transfer, and the abrogation of the necessity of abstracts of title. The system was found to be a great benefit to the people in South Australia. The colonies of Victoria and New South Wales adopted it, to be followed by Queensland, Tasmania and New Zealand, until at last the whole of Australasia is under the Torrens system.[2] Twenty years experience, during which over 540,000 transactions have been completed with a reduction of cost from pounds to shillings, and a saving in time from months to days, is the best practical test of its merits.[3] The registration of title is simply the application of the principle now in force in regard to ships, to land. Every lawyer appreciates the relief it is to find an abstract of title showing a few simple *mesne* conveyances from the original patentee. Under the Torrens system, every transfer of the fee is like an original patent from the government; it is indefeasible. Each time a lot is sold the purchaser gets a certificate from the government, which is guaranteed by the government, and back of which no court of law can go. In this indefeasibility and the guarantee feature, which will be explained later on, are found the essential benefits of the plan. A descrip-

[1] As to the Australian system *passim*, consult Torrens' Essay on the Transfer of Land by Registration, published by the Cobden Club. As to the Canadian system, see Jones on the Torrens System.

[2] Jones' Introduction.

[3] Report on Registration of Title in British Colonies; House of Commons Blue Book, May, 1881; Torrens' Essay, pp. 17-20; One-sixth of the granting of indefeasible title in Ireland, and 152,000 separate titles in the Colonies made without a mistake; Torren' Essay, p. 20.

tion of the Australian law will serve best for illustration, though the Ontario forms are in some respects preferable. In Australia all lands alienated from the crown subsequent to the passage of the law come under its provisions. Those granted prior to its passage may be brought under its provisions on the voluntary application of the owner, but once in, cannot be withdrawn. It may be said by way of parenthesis, that 98 per cent of the lands alienated from the crown in the colony of Queensland are under the act. And so in proportion in all the colonies; so much so, that it is deemed almost necessary in offering lands for sale, to state "that the title is that of the Torrens act," for it is claimed that purchasers cannot be got otherwise. A person desiring to place his lands upon the register makes application for that purpose, accompanying it with proof of his title, title deeds, abstracts, maps, etc. The application and proofs are submitted to the examiners of titles, a board consisting of a barrister and a conveyancer, assisted by a draughtsman and surveyor. The examiners having examined the title, report to the registrar or recorder of titles—1st, whether the descriptions are clear and definite; 2d, whether the applicant is in undisputed possession; 3d, does he appear, in equity and justice, rightfully entitled thereto; 4th, does he produce such evidence as would make his title invulnerable in an action of ejectment. If the applicant gets successfully through this initial investigation, on the recommendation and under the direction of the examiners, notices are served on all persons interested, either personally or by publication. If within the time limited by the notice any one desires to test the validity of the applicant's title, he may file a *caveat*. The filing of the *caveat* (it is called a "caution" under the Canadian law), immediately suspends operations before the examiners and registrar, and takes the case into the supreme court, where the rights of the parties are fully litigated. If no *caveat* is lodged, or if it be withdrawn or the judgment of the supreme court be in favor of the applicant, the land is immediately brought under the operation of the act, and a certificate of title is issued vesting the estate indefeasibly in the applicant. These certificates are in duplicate; they describe the land, and refer to the official survey and map, and if necessary a diagram is attached to the certificate. They set forth the nature of the estate, whether in fee simple or limited, and give notice by memorials indorsed thereon, of all lesser estates, leases, charges, easements, mortgages, etc. Ample space is left for subsequent memorials, recording the transfer, or extinction of these or additional incumbrances. The register is compiled by binding together the duplicate of all certificates of title representing the freehold. Each of these certificates represents a distinct root of title, and constitutes a distinct folium of the register, which folium may comprise one or more pages for recording the memorials of incumbrances. In case of the transfer of a part only of the fee, the balance may remain in the old certificate, with a memorandum of the sale of the part disposed of, or the original owner may take out a fresh certificate for the part retained. The purchaser must, however, take out a new certificate for the part purchased by him, which occupies a separate folium of the register. Registered estates are held subject to such charges, estates and interests as are entered upon the folium in the register, and indorsed on the certificate held by the owner, but free and clear from all others whatsoever. They take the priority among themselves, of course, according to the date of filing, except when registration is procured by fraud; and a *bona fide* registration is indefeasible, even though there be a fraudulent one in the channel. A registered owner may, at any time, for a trifling fee, exchange his existing certificate for a new one cleared of all cancelled incumbrances; and the registrar may, whenever he deems a certificate of title incumbered with an unnecessary number of defunct memorials, call it in and require the registered owner to take out a fresh one. It is plain that this saves the record from becoming cumbrous. Searches and abstracts are needless except to ascertain whether *caveats* (which are a sort of *lis pendens*), are filed against the property. A journal is kept, and a system of book-keeping that enables the registrar to tell you at a glance whether there is anything against the land not upon your certificate of title.

It would be impossible, within the scope of this paper, to go into a description of their forms of conveyance. It will be sufficient to say that the forms (all prescribed by statute) are of the simplest nature, like our statutory

deeds, which on being presented to the registrar are noted by memorandum made under his hand. A simple stamping in red, or some other notation, indicates the cancellation of a certificate or mortgage, or the surrender of a lease. Some changes have been made which are worthy of note. In the case of a mortgage, the old fiction of transferring the legal estate is dropped. The mortgagor retains the certificate, which, of course, has a memorandum of the mortgage indorsed upon it, which notifies every subsequent purchaser; and when the mortgage is paid he may obtain a new certificate showing an absolutely clear title. In the case of an equitable mortgage, the intending mortgagor may, to illustrate, take his certificate of title to his bank, and execute to the bank a contract of a charge, say for an overdrawn account. The bank takes these two instruments and puts them in its vault, and immediately, either by letter or telegram, lodges a *caveat* with the registrar, which will prevent any further incumbrances on or change in the title until, on being notified, it has an opportunity to make its equitable mortgage a registered one. So with settlements, the registered owner may make an estate to himself for life, reversion in succession with or without power of appointment, and remainder over. The existing certificate is then cancelled, and a new certificate with the life estate as its root is issued, and a fresh folium opened. As the life estates and subsequent estates cease, new certificates are issued.

As to indirect settlements, no notice of trusts can be registered, but the trust deed may be filed and a *caveat* lodged prohibiting the registration of any dealings in the land, except in accordance with it or with the sanction of the court. He may also enter the words "no survivorship" on the certificate, requiring, of course, a vacancy in the number of trustees to be filled by the court. The registrar may also lodge a *caveat* in the interest of the *cestuis que trust*.

In Canada and in Prussia, provision is made for registering possessory titles which admit of any person claiming a title fee to have it registered. The possessory title is not indefeasible except as to claims, and is open to attack for any anterior defects, and only becomes indefeasible when the statutes of limitation render it so. There is also provision for registering "qualified titles" title for a limited time. A glance now at the Prussian system, which is modeled closely on the Australian.[4] One advantage the Prussian statute has over the Australian is, that it was compiled by skilled lawyers, and thus is free from the many crudities of the Torrens act. Speed, cheapness and brevity are the result. Before the passing of the law in 1872, Prussia had a system of registration very much like the American, save that it carried no constructive notice. As *livery of seisen*, requiring, of course, delivery of possession, was the law, registration of deeds was not nearly as necessary as with us, and consequently few deeds were recorded, but mortgages always were. This led to many uncertainties, causing the minister of justice to present his bill, which is the present law of Prussia. The people being accustomed to registration, and there being a complete staff of registry officers, and the local registration offices in every market town, the system was introduced without any difficulty. The public cadastral survey was also ready at hand for use. Under the Prussian system, an absolute guaranteed title can be obtained on—1st, proof of naked possession for forty-four years; 2d, possession for ten years, coupled with *prima facie* evidence that such possession has a definite legal commencement; 3d, possession for less than ten years, commenced with a root of title of proved validity, and either proof of possession by self and predecessor together for ten years, or proof that the predecessor had a valid root of title; 4th, production of a "certificate of ownership," obtainable under the old law. (Prussia has had something akin to the Torrens system for over 100 years). 5th, purchase at judicial sales. A registered owner is the only person who can legally transfer or mortgage the land; adverse possession has no effect upon his rights; a registered transfer from him is good, even though the transferee had notice of a prior equity in another. The process of transfer or of mortgage is of the simplest kind. It may be made at a distance by writing or at home, by making an oral conveyance before the register, who makes the required entry and this passes the title, the purchaser taking the appropriate certificate. Settlements, life estates, reversions, etc., are like the Torrens system. Brickdale says, that "the practical

[4] As to the Prussian system *passim*, consult article of C. F. Brickdale, 4 Quarterly Review, 63.

results of the Prussian registry system are that parties habitually conduct sales and mortgages without legal assistance in the space of an hour, and for fees that are in many instances below even the Australian scale."

The Prussian system presents one singular novelty—a new sort of mortgage. The old German "*hypothek*" corresponds very nearly to our mortgage. This is left undisturbed. There is, however, another kind called a "land charge" or "*grundschuld*." It differs from a mortgage in that it is not an accessory to a personal debt, but is an independent interest in real estate. While commonly created in the way of security for a debt, this does not affect its own constitution. Payment of the debt does not extinguish it; it still subsists until cancelled on the register. The "*grundschuld*" is issued by the register, and has most of the properties of a bill of exchange. Payment cannot be claimed unless it is produced. It may be made payable to the order and pass by indorsement, or indorsed in blank and pass by delivery. It may have interest coupons attached. The land owner may discharge it by depositing the amount with the registrar, and thus have the cloud removed from his title. These land charges are very popular with business men. One writer instances a case of a cancelled "*grungschuld*" of six pounds then in his possession, which was the nineteenth in order of priority on the same land. Five of the prior charges had been paid off; the other thirteen were for odd amounts, ranging from fifteen shillings up to fifteen pounds. Under all the registry of title systems, the penalties for fraud or deceit are very heavy. The fees are remarkably light. Under every plan deduced from the Torrens, a certain proportion of the fees is set aside as a guaranty or indemnity fund. Upon this fund any person injured by fraud or mistake in the registry has a claim; in other words, the government not only guarantees the indefeasibility of the title of the transferee, but insures any one injured by the transfer. The theory of it is that no one should be misled into making improvements on land which he may not really own, holding it better that the real owner should have monetary compensation for his loss rather than his land. The economic result is that the system gives the encouragement of security to capital to improve land. The fund always seems to be ample; indeed, in Australia the surplus became so large that it had to be legislated into the general treasury.[5]

BRADLEY G. SCHLEY.

Milwaukee, Nov. 22, 1890.

[5] The necessary brevity of this article leads the writer to cite for the benefit of those who might be sufficiently interested in the subject to go into a deeper investigation of it, the following: "An Essay on the Transfer of Land by Registration," by Sir Robert Torrens, published by the Cobden Club; Report on Registration Title in British Colonies, House of Commons Blue Book, May, 1881; Blue Book of May 1876; Blue Book May 10, 1881; Various Reports to and preceedings before Parliament, 1862-1890; 25 & 26 Vict. Cap. 53 (Lord Westbury's Act, 1862); The Land Transfer Act, 1875, (Lord Cairn's Act) 38 and 39 Vict. Cap. 87; Jones' Torrens' System; Toronto, 1886; 2 Law Quarterly Review, pp. 12, 324; 3 *Id.* 263-279; 4 *Id.* 63 (Prussian System); 5 *Id.* 275.

DOWER—DIVORCE—ESTOPPEL—ALIMONY.

STOREY V. ADAMS.

Supreme Court of Illinois, January, 1891.

Though a wife divorced for the misconduct of her husband has a right of dower in the estate of the latter, a decree for alimony, payable while the wife remains sole and unmarried, entered by the court by consent of the parties, will bar such dower, though not expressly allowed in lieu thereof.

BAKER, J.: This writ of error was sued out to reverse a decree of the circuit court of Cook county, assigning dower in a lot of ground fronting twenty feet and four inches on Dearborn street in Chicago, and being a part of lots 1 and 2 of block 57 in original town of Chicago, to Maria P. Storey, the defendant in error. Prior to February 18, 1868, defendant in error was the wife of Wilbur F. Storey, and on that day was divorced from him by said circuit court, on the ground of his wilful desertion. During the coverture he was seized in fee of the above mentioned premises. The decree for alimony entered in said divorce suit was as follows: "And the cause further coming on to be heard on the question of alimony and maintainance of the said complainant, it is thereupon, by and with the consent of the said parties, plaintiff and defendant, ordered, adjudged and decreed that the said defendant, Wilbur F. Storey, pay or cause to be paid, to and for the use of the said complainant, for so long as she may be and remain sole and unmarried, the sum of two thousand dollars per annum, to be paid to her quarterly in installments of five hundred dollars each, the first of which shall be payable on the first day of June, A. D. 1868, and the same sum every three months thereafter during the time aforesaid, at such place or places in Chicago as she shall from time to time appoint; and further that said sums of money shall be and they are

hereby declared to be a lien and a charge upon the following premises and lands, but upon none other, situate in the City of Chicago, County of Cook and State of Illinois:" (particularly describing the premises first above mentioned). The decree further provided that the defendant therein should execute and deliver a mortgage or trust deed to said premises (to be approved by the master in chancery) to Sidney Myers, in trust for Maria P. Storey, as security for the payment of said alimony, and the performance of all the requirements of said decree, and that during the time and continuance of said lien and charge he should well and truly pay all taxes and assessments, ordinary and extraordinary, laid or assessed against said premises, and should at his own costs and charges keep the rents of the building on said premises insured to the amount of $2,000 per annum for the benefit of the said Maria P. Storey, so long as her interest therein should continue. On the day of the entry of said decree said Wilbur F. Storey executed to said Maria P. Storey a bond in the penal sum of $50,000, and therein bound himself, his heirs, executors and administrators, for the payment of the same. The condition of the bond recited the provisions of the decree, and the obliger agreed therein to stand to, abide by and perform the terms of such decree, and to pay all taxes and assessments, and to insure the rents of the building on the premises to the amount of $2,000 per annum for the benefit of said Maria P. Storey, such insurance to be kept up as long as said sum of $2,000 per annum shall be payable as provided in said decree, and the duty of keeping up said insurance to be binding upon his heirs, executors and administrators and upon the grantees and assigns of said premises. On the same day said Wilbur F. Storey executed and delivered to said Sidney Myers a trust deed for the premises above mentioned, which deed contained full covenants of warranty and a covenant that the premises were free and clear from all liens and incumbrances whatsoever. Said deed was given to secure the bond above described and the prompt and punctual performance of the conditions thereof; and in it the grantor again agreed to do and perform all and singular the matters and things specified in the decree, and in the bond and the conditions thereof. The trust deed further provided that in case of default on the part of the grantor, his heirs, executors, administrators or assigns, the trustee or his successor in trust might sell the mortgaged premises, or any part thereof, and convey the same to the highest bidder for cash, etc., and that he should apply the proceeds of sale, first, to the payment of expenses, etc., second, should provate the residue to the payment, satisfaction and performance from time to time of the conditions and agreements contained and set forth in the bond, while and so long as the same should remain in force, and to the performance of the requirements of the order and decree; and third, that after that shall have been done, then to render the overplus, if any, to the grantor, his heirs, or assigns. On August 8th, 1882, Wilbur F. Storey conveyed said premises by warranty deed to John Quincy Adams, one of the plaintiff's in error, subject, however, to the lien of the trust deed to Sidney Myers. On July 1st, 1884, said John Quincy Adams leased said premises to Lorenz P. Hansen, the other plaintiff in error, for a term of ninety-nine years, at an annual rental of $6,000, and all taxes and assessments. Wilbur F. Storey died on the 27th day of October, 1884. Thereafter, on August 5th, 1887, Maria P. Storey, his divorced wife, the new defendant in error, filed this petition against the plaintiff's in error, for the assignment of dower to her in the premises in question. Answers and replications were filed; and upon the hearing, the circuit court decreed that the petitioner was entitled to dower in the premises, and that she have and recover dower therein; that the premises were not susceptible of division; that she have and recover as an allowance in lieu of dower the sum of $1,186 annually from the date of the decree and during her actual life; that she recover from Adams and Hansen the sum of $666.67 damages from the date of the filing of the petition; and further recover from Hansen the sum of $2,625 damages from the 20th day of December, 1884, to the commencement of suit, etc. The matter of the decree of February 17, 1867, allowing to Maria P. Storey, the defendant in error, herein, for her alimony and maintainance, the sum of $2,000 per annum, "for so long as she may be and remain sole and unmarried," was before this court at a former term, and it was held that the annual allowance of $2,000 to be paid according to the provision of that decree, did not terminate with the life of the husband, but was binding upon his estate at his death, and should be continued to her so long as she lives and remains sole and unmarried. Storey v. Storey *et al.*, 125 Ill. 608. In the present proceeding for the assigment to her of dower in the same land and premises upon which said annuity was made a lien and a charge, various points are made by the plaintiff's in error, such as the sufficiency of the proof to establish the death of Wilbur F. Storey, the competency of the evidence which was introduced to show the seizin by him during the coverture, of the premises in which dower is claimed, the rendering of a decree against plaintiffs in error jointly for damages for detention of dower and the entering of any decree whatever against Hansen, one of the plaintiffs in error, for damages for the non-assignment of dower, which are merely auxiliary to the paramount question at issue, and which in the view which we take of that question we may forbear considering.

In this State, the right of a wife to be endowed of a third part of all the lands whereof her deceased husband was seized of an estate of inheritance at any time during the marriage is a statutory as well as a common law right. Being a clear statutory and legal right it continues, unless she

voluntarily relinquishes it, or is barred for one of the causes prescribed by the statute, or she is by some rule of law or equity precluded or estopped from asserting it. In Gilbert v. Reynolds, 51 Ill. 513, it was held that a widow may by her laches estop herself from claiming dower. In Collins v. Woods, 63 Ill. 285, and Allen v. Allen, 112 *Id.* 323, it was held that acts and conduct sufficient to constitute an equitable estoppel would bar the right. In Hoppin v. Hoppin, 96 *Id.* 265, it was held that her covenant of warranty against all incumbrances would operate to prevent her from afterwards setting up a claim to dower. In Torrey v. Minor, 1 S. & M. Chy. Rep. 489, it was held that a covenant of the ancestor of the widow barred her claim to dower. And in Skinner's Executors v. Newberry, 51 Ill. 203, where moneys were due the testator at his decease upon executory contracts for the sale and conveyance of real estate, it was said that the widow "by claiming her share of the purchase money, cuts off her rights of dower in the lands sold." The divorce of 1868 was granted for the fault and misconduct of the husband, and it was expressly found by the decree that defendant in error was without fault in the premises. So, as a matter of course, under our statute (Dower Act, sec. 14), the mere entry of the decree for divorce had no effect to deprive her of her inchoate right of dower. But the decree for divorce was followed by a further decree, wherein it was adjudged and decreed that the defendant in the divorce suit pay or cause to be paid to and for the use of defendant in error, for so long as she may be and remain sole and unmarried, the sum of $2,000 per annum, payable in quarterly installments of $500 each, and further ordered and decreed that the sums of money so allowed her and for her use should be a lien and a charge upon the premises which are described in the decree and in which she is now seeking to get dower. Dower is the provision which the law makes for a wife out of the lands and tenements of her husband, for her support and maintainance after his death. Alimony is that allowance which is made to a woman on a decree of divorce for her support out of the estate of her husband; it is the equivalent of the obligation implied in every marriage contract—that the husband shall furnish his wife a suitable support and maintainance. Stillman v. Stillman, 99 Ill. 196. By the English law, alimony was but an allowance during the joint lives of the husband and wife, and it could not be ordered for the term of the wife's life because it is a maintainance to her, while the husband's duty to her ceases at his death. See Lennahan v. O'Keefe, 107 Ill. 620, and the authorities there cited. It was said in that case that under our statute the power of the court to allow alimony is broader than it was in England; and also said that the court may under exceptional circumstances make an allowance for alimony once for all, of a sum in gross, or may decree real estate absolutely to the complainant. But no allowance of the character of either of those above indicated was made in the decree of 1868, and the provision therein made for the alimony, maintainance and use of the divorced wife was an annuity of $2,000 per annum, for so long as she may be and remain sole and unmarried, and such annuity was amply secured by making it a lien and a charge upon real estate. The annuity in question is an annuity for life, since it can be determined only by the voluntary act of the annuitant. 4 Coke, 3*a*; Hamilton v. Buckwalter, 2 Yeates, 389. At the time that the decree was entered for the $2,000 per annum, defendant in error had two rights and two only as against defendant in the divorce suit, or his property; one was against him, personally, for support and maintainance during their joint lives, and which, if she did not sooner decease, would necessarily terminate with his life; and the other was an inchoate right, to become consummate at his death, to be endowed of the third part of all the lands whereof he had been seized of an estate of inheritance during the coverture. At the same time, the only legal duty which was imposed upon said defendant was one which was correlative to the first of the above mentioned rights, and was the duty to support and maintain her during the joint lives of both. There was no legal duty incumbent upon him that was responsive to the other of said rights of defendant in error, but in place thereof the law itself both gave to her such right and secured the same to her, but out of his estate, not to take effect however, until after his decease. The decree which was entered by the court was responsive to both of these rights of defendant in error, and gave to her the full measure of all that she could lawfully or justly or equitably claim in satisfaction of either and both of the rights with which she was invested. The decree did not in express terms provide that dower should be barred, but such was its evident intention; and the provisions of the bond, trust deed and other instruments in evidence indicate that it was so understood by both of the parties to the suit, and by the court. It was, as appears upon its face, a consent decree, and it ordered and adjudged that defendant "pay or cause to be paid, to and for the use of the said complainant, for so long as she may be and remain sole and unmarried, the sum of $2,000 per annum, etc.," and further ordered and decreed "that said sums shall be and they are hereby declared to be a lien and a charge upon the following premises and lands, etc." The moneys are decreed to be paid "to and for the use of complainant;" and the annuity is extended during the term of her life, and is made a lien and a charge upon the real estate of the defendant, thereby giving her a life estate therein. As matter of fact, the allowance made not only furnished her with alimony proper, but with a full and liberal equivalent for dower. The installments of the annuity that have accrued since the death of the husband, and those that may hereafter become due were and are based upon no right vested in defendant in error, or

duty incumbent upon her divorced husband, unless they were and are predicated upon her right of dower. It must be presumed under the circumstances of the case, that the allowance of $2,000 a year for the time intervening the death of said husband and her own death, was in lieu of dower. The decree for support and maintainance was a consent decree, and as such to be regarded as a contract between the parties to the suit. Defendant in error having taken support and maintainance and still continuing to claim and take support and maintainance under the contract, and which was and is a charge upon the real here in question, she is estopped from also claiming dower in the same land. The contract and her conduct amount to a waiver of dower. It is a well settled principle acknowledged at law as well as in equity, that a wife cannot have both dower and what is given in lieu of dower. Birmingham v. Kirwan, 2 Sch. & L. 444; Parham v. Parham, 6 Hump. 287; Warfield v. Castleman, 5 T. B. Monroe, 517. In Lennahan v. O'Keefe, 107 Ill. 620, this court said "that it would require an extraordinary case to justify the postponement of creditors and heirs to the payment of both dower and almost, currently, during the life of the divorced wife; and that in very many cases such an order would be equivalent to an entire appropriation of the husband's estate." The decree is reversed and the cause is remanded, with directions to dismiss the petition at the cost of the petitioner. Reversed and remanded.

NOTE.—*How Dower May be Barred.*—The right of the wife to dower in the lands of her husband may be barred or defeated in a number of ways. First, it may be barred by an antenuptial settlement or agreement, which in effect is called a legal jointure. 1 Washb. Real Property, 263. Except under the express provisions of some statute, no such settlement or agreement between husband and wife is at law a bar to dower. Martin v. Martin, 22 Ala. 86; Andrews v. Andrews, 8 Conn. 79; Cawley v. Lawson, 5 Jones' Eq. (N. C.) 132; Murphy v. Murphy, 12 Ohio St. 407; Murphy v. Avery, 1 Dev. & B. (N. C.) 25; Gelzer v. Gelzer, 1 Bail. Eq. (S. C.) 387. Though such agreement, if executed in good faith, is respected in equity. Minter v. Minter, 28 Ohio St. 347; Hathaway v. Hathaway, 46 Vt. 234; Freeland v. Freeland, 128 Mass. 509; Boardman's Appeal, 40 Conn. 169; Logan v. Phillips, 18 Mo. 22; Andrews v. Andrews, 8 Conn. 79; Magee v. Magee, 91 Ill. 548; Jordan v. Clark, 81 Ill. 465; Hastings v. Dickinson, 7 Mass. 153.

Second. Dower may be barred by joining in husband's deed to the land, in a compliance with statutory formalities, or by a valid release or conveyance of dower. As at common law any agreement between husband and wife was void, the dower estate being a common law one, a wife had no power to contract for its release, and, therefore, the only way in which a wife can, during coverture, bar or defeat her dower, is by complying strictly with statutes relating to its release, (Grave v. Todd, 41 Md. 633), or by acting under the full capacity to contract, accorded women by the statute of a few States. Martin v. Martin, 22 Ala. 86; Lathrop v. Foster, 51 Me. 307; Davis v. McDonald, 42 Ga. 205; Keelet v. Tatnell, 23 N. J. 62; Conover v. Porter, 14 Ohio St. 260. But it is conceived that, outside of the power given by statutes, no postnuptial settlement or agreement at law between husband and wife is valid to convey, bar or release dower. Postnuptial agreements for separation and for the separate maintenance of the wife, through the intervention of a trustee, are valid and will bar dower. Carson v. Murray, 3 Paige, 483; Bettle v. Wilson, 14 Ohio, 257; Magee v. Magee, 67 Barb. 487; Randall v. Randall, 37 Mich. 563; Fox v. Davis, 113 Mass. 255.

Third. Dower may be barred or defeated by an incumbrance placed upon the husband's property before his marriage, or by alienating his property, or by changing property which would be subject to dower into property which is not. Houston v. Smith, 88 N. C. 312; Rawlings v. Adams, 7 Md. 26; Spangler v. Stanler, 1 Md. Ch. 36; Rands v. Kendall, 15 Ohio, 671.

But, as a general rule, no acts of a husband during coverture, without the concurrence of the wife, can defeat dower. Crecelius v. Horst, 11 Mo. App. 304; Gerry v. Stinson, 60 Me. 186.

Fourth. Dower may be barred by a settlement, or, as it is termed, a jointure, made upon husband and wife during their lives. Jointures are known as legal and equitable. A legal jointure bars dower. Benson v. Spooner, 2 Cush. 267; Hastings v. Dickinson, 7 Massl. 153. An equitable jointure is such a provision as requires a widow to choose between it and dower, and, if she accepts it in lieu thereof, the dower is barred in equity independently of statute. Rends v. Corben, 24 Ga. 185; Garard v. Garard, 7 Bush, 436; Wentworth v. Wentworth, 69 Me. 247; Johnson v. Johnson, 23 Mo. 561, S. C., 30 Mo. 72; Gregen v. Garrison, 27 Ohio St. 50.

Fifth. In certain cases a wife may defeat dower by election to take something in its place. This may be in accordance with the terms of a will, or, as before stated, under an equitable jointure, or where her husband has exchanged some lands for others, his widow must elect to take her dower either in the new or original lands, and cannot have dower in both. Mosher v. Mosher, 32 Me. 412; Cass v. Thompson, 1 N. H. 65; Wilcox v. Randall, 7 Barb. 633.

Sixth. Dower may be defeated by her own acts, sometimes in the nature of estoppel, though very rarely. Crenshaw v. Creek, 52 Mo. 98; Gilbert v. Reynolds, 51 Ill. 513; Allen v. Allen, 112 Ill. 325. Though during coverture a wife cannot estop herself from claiming dower, except by release duly executed, (Martin v. Martin, 22 Ala. 86; Chicago v. Kenzie, 49 Ill. 289; Reiff v. Horst, 25 Md. 42), yet, after her husband's death, she is *sui juris*, and may lose her estate by estoppel, just as any other person may. Jones v. Powell, 6 Johns. Ch. 194, 5 Amer. & Eng. Encyclo. Law, 920.

Seventh. Laches or lapse of time may be a bar to a claim of dower in equity. Banksdale v. Garrett, 64 Ala. 277; McLaren v. Clark, 62 Ga. 106; Chew v. Farmers, 9 Gill (Md.), 361; Tuttle v. Wilson, 10 Ohio, 24. So also the statute of limitations in some States (Rice v. Nelson, 27 Iowa, 148; Duncan v. Angier, 20 Me. 242; Berrien v. Conover, 16 N. J. L. 107; Tuttle v. Wilson, 10 Ohio, 24; Care v. Keller, 77 Pa. St. 487), though in others it has been held not to bar. Chapman v. Shroeder, 10 Ga. 321; Phares v. Waters, 6 Iowa, 106; Simonton v. Houston, 78 M. C. 408.

Eighth. Dower may be barred by the exercise of the right of eminent domain on the part of the government. Tisdale v. Risk, 7 Bush, 139; Runnels v. Webber, 59 Me. 488; Ervin v. Brady, 48 Miss. 560; Sheldon v. Bradley, 37 Conn. 324; Bonner v. Peterson,

44 Ill. 253; Duncan v. Terre Haute, 85 Ind. 104; French v. Lord, 69 Me. 537; Nye v. Taunton, 113 Mass. 277; Weaver v. Gregg, 6 Ohio St. 547.

Ninth. Dower may be barred by the termination of the husband's estate (Jackson v. Kip, 8 N. J. 241; Norwood v. Morrow, 4 Dev. & B. (N. C.) 442; Toomey v. McLain, 105 Mass. 122), or by defeat of the husband's defeasible title. Toomey v. McLain, *supra*.

Tenth. Dower may be barred by judicial sale under legal proceedings, where the sale takes place under a lien prior to dower. Mantz v. Buchanan, 1 Md. Ch. 202.

Eleventh. The husband's bankruptcy defeats dower in certain cases where his voluntary assignment would have this effect. Perkins v. McDonald, 10 Lea (Tenn.), 732. But usually the assignee in bankruptcy holds the bankrupt's land, subject to the wife's dower. Porter v. Layear, 109 U. S. 84; Dudley v. Easton, 104 U. S. 99; *In re* Lawrence, 44 Conn. 411; Dwizer v, Garlough, 31 Ohio St. 158.

Twelfth. Dower may be barred by act of the wife during coverture under the operation of an old English statute, which has been re-enacted in many of the States, providing that the wife may defeat her dower by elopement followed by adultery, or by adultery alone, or by abandonment, (Thornberry v. Thornberry, 18 W. Va. 522), or other wrongful conduct. But of course in the absence of statute, no such acts would constitute a bar to dower. Sisk v. Smith, 68 Ill. 503.

Thirteenth. The question as to how far a divorce will bar the right of dower, is one depending in a large measure upon the local provisions of statutes. At common law a divorce *a mensa et thoro*, which is in effect simply a legal separation, did not bar dower, inasmuch as it did not dissolve the relation of husband and wife. Hokamp v. Hagaman, 36 Md. 511; Segrave v. Segrave, 13 Wis. 443; Clark v. Clark, 8 Watts. & S. 85; Walsh v. Kelly, 34 Pa. St. 84; Wait v. Wait, 4 Barb. 192; Bryan v. Bachelor, 6 R. I. 546; Watkins v. Watkins, 7 Yerg. (Tenn.) 283. But a divorce *a vinculo matrimonii* was held to bar dower, because the divorce absolutely puts an end to the marriage. Inasmuch as, at common law, divorces were all of the latter class, avoiding the marriage and all rights and liabilities resulting from it, it may be said that at common law the obtaining of a divorce was an absolute bar of dower, inasmuch as the one element of the right of dower was wanting, namely, marriage of the husband at his death. It is thought that under any theory of the law of dower, a wife is not entitled to dower in land which the husband acquires after the divorce is granted, except where such power is expressly granted by statute. Kade v. Lauber, 48 How. Pr. 382. In many of the States, statutes provide, in effect, that in case of a divorce obtained where the wife is the innocent party, or where the husband has been guilty of misconduct, the wife shall have her right of dower (Stillson v. Stillson, 46 Conn. 15; Runnels v. Webber, 59 Me. 488; Lamkin v. Knapp, 20 Ohio St. 454; Marvin v. Marvin, 59 Iowa, 699; Crane v. Fipps, 29 Kan. 585; Wood v. Simmons, 20 Mo. 363), in the same manner as if the husband were dead. Merrill v. Shattuck, 55 Me. 370; Stilphen v. Hondlette, 60 Me. 447; Hunt v. Thompson, 61 Mo. 148; Percival v. Percival, 56 Mich. 297; Gleason v. Emerson, 51 N. H. 405. In some of the States, under the above provisions of statute, she is entitled to dower only upon the husband's death (Hunt v. Thompson, 61 Mo. 148; Lamkin v. Knapp, 20 Ohio St. 454); but in others the right to dower accrues at once, and may be assigned just as if the husband were dead. Harding v. Alden, 9 Me. 140; Tatro v. Tatro, 18 Neb. 395. Up to Wait v. Wait, *supra*, the doctrine was firmly established in this country, that unless a statute otherwise ordains, no woman can have dower where there was no subsisting marriage at the time of the husband's death. But in that case, the Court of Appeals of New York held the wife entitled to dower after obtaining divorce for misconduct of the husband, though the statute of that State only inferentially authorized it, providing that, "in case of divorce dissolving the marriage contract for the misconduct of the wife, she shall not be endowed." But, as a general rule, it is undoubtedly established that a divorce from the bonds of matrimony extinguishes the right of dower, unless that right is saved by statute. Whitsell v. Mills, 6 Ind. 229; Billan v. Herklebroth, 23 Ind. 71; Lewis v. Sleeter, 2 Green. 604; McCrary v. McCrary, 5 Clark (Iowa), 232; Broddick v. Briggs, 11 Wis. 126.

Alimony as Bar of Dower.—The question which arose in the principal case as to how far a decree for alimony will bar the right of dower, is one not entirely settled, and upon both sides of which there is legitimate argument. The right to alimony rests on the husband's duty to support the wife, and is not given if she has sufficient separate estate. Bishop on Marriage and Divorce. At common law, alimony was only for the life of the husband, as his duty to support her ceases at his death. It is undoubtedly true that no mere agreement between husband and wife, by which the latter agrees to bar her dower or to accept alimony in lieu of dower, will be effectual, on account of the disability of the wife to contract during coverture. Shelton v. Shelton, 20 S. C. 560; Martin v. Martin, 22 Ala. 80. In an Indiana case (Wiseman v. Wiseman, 73 Ind. 112), where there was a contract of separation, wherein the husband released to his wife certain property and transferred to her a certain bond, the court held that this, with desertion of the wife, was no bar to dower, and laid down the rule that the statute which in such cases provided absolutely for dower could not be evaded. And even in Connecticut, where the statute is broader than in any other State, and which provides for dower upon the obtaining of a divorce for misconduct of the husband, and for the survival of the right of dower where "no part of the estate of her husband was assigned to her for her support," it was held that dower was not barred by an agreement on the part of the wife not to take alimony, where, in fact, none was given by the court. Stilson v. Stilson, 46 Conn. 15. As the principal case shows, the Illinois statute provides for the survival of the right of dower after divorce for misconduct of the husband, but says nothing as to alimony. Yet it is conceived that the power of the court extends not only to the question as to the amount of alimony the husband is to pay, the terms of the payment and the length of time payment is to be made as agreed upon between the parties and decreed by the court, as was done in a previous Illinois case (Storey v. Storey, 125 Ill. 608), but also extends to the length of concluding the parties by an absolute decree of permanent alimony expressly in lieu of dower. See Fletcher v. Holmes, 25 Ind. 458; Buck v. Buck, 60 Ill. 242; Stratton v. Stratton, 77 Me. 377; Miller v. Miller, 64 Me. 484. The case of Wiseman v. Wiseman, 73 Ind. 112, may be authority against this doctrine, although that was not a case where alimony was actually decreed by the court in lieu of dower. And in a recent case it was held that upon divorce being granted, a decree in favor of the plaintiff for permanent alimony will bar her right to

any further claims against the estate of the husband, unless a contrary intent is shown in the decree. And where she accepts any of the pecuniary provisions previously named, in lieu of dower, she will be barred thereby. And where the court, upon rendering a decree of divorce, decrees property to the wife in the nature of permanent alimony, it will be held to include all the property of the husband, including the right of dower to which the wife will be entitled. Tatro v. Tatro, 18 Neb. 395. The only case which seems to militate against this view is Taylor v. Taylor, 93 N. C. 418, where it was held that a decree for alimony does not bar the right of dower. But it will be noted that that was a case of divorce *a mensa et thoro*, and not from the bonds of matrimony, and that the decree for alimony in no respect seems to have been intended in lieu of dower. The principal case, therefore, seems to be one which might have been decided either way, without violating established precedents or principles. It may be said on the one hand, that the decree did not expressly provide for alimony in lieu of dower, though there is reason for the view of the court that such was the intention. On the other hand, the decree being for alimony only while she remained sole and unmarried, it may with some plausibility be contended that the decree was not for permanent alimony, viz., for her life absolutely, but was, in effect, simply a temporary provision for her support and maintenance, and that the very misconduct of the husband, under the view of the court, put it into his power to relieve himself of a large share of his marital duties and liabilites to her.

RECENT PUBLICATIONS.

THE AMERICAN DIGEST, Annual, (1890.) Being Vol. 4, of the United States Digest, Third Series Annual, also, the Complete Digest for 1890. A Digest of all the Decision of the United States Supreme Court, all the United States Circuit and District Courts, the Courts of Last Resort of all the States and Territories, and the Intermediate Courts of New York, Pennsylvania, Ohio, Illinois and Missouri, the U. S. Court of Claims, Supreme Court of the District of Columbia, etc., as Reported in the National Reporter System and Elsewhere, from January 1, to September 1, 1890. With Note of English Cases, *Memoranda*, of Statutes, Annotations in Legal Periodicals, etc., a Table of the cases Digested, and a Table of Cases Overruled, Criticised, Followed, Distinguished, etc., During the Year. References to the "State Reports" Given by an Improved Method of Topical Citation. Prepared and Edited by the Editorial Staff of the National Reporter System. St. Paul, Minn.: West Publishing Co., New York; Digest Publishing Co., 1890.

The constant effort on the part of the West Publishing Co., in the publication of its annual digest, to improve and to give its patrons the very best possible digest obtainable, is apparent. As each digest has made its appearance, we have noted within its pages, changes and improvements over the past ones. But the one now at hand seems to have reached the acme of perfection and to contain all features and incidents of a complete digest that human ingenuity may devise. In the first place, we regard the change in the time of the issuance of the annual digest, as one of great importance. Heretofore the digest has made its appearance at the beginning of the year, and in the midst of the work of the courts, at a time when the filings of opinions are the largest, and when the practitioner is busiest. There is no reason why a digest should not be issued as this one is, commensurate in point of time with the actual work of the courts, in other words to contain the digest of opinions, rendered from the time of the meeting of the courts in September and October until their final adjournment for the summer vacation. This not only gives the publisher an opportunity during the least busy season to prepare the digest, but puts it into the hands of the practitioner at a time of the year when he can find opportunity to examine and study it. Again we regard the adoption of the features of the "Complete Digest," with which the American Digest has had the good fortune to unite, as of value. As we have said before in connection with reviews of the Complete Digest, it has contained many commendable points, and among others, the practice initiated by it of referring not only to the State Reports so far as was possible, but also of making reference to the articles, reviews and essays to be found in legal journals, which we naturally consider of very great value to any publication. The arrangement of this digest, its completeness so far as matter is concerned, its mechanical execution by which the examiner may readily search through its pages, seems to make it all that is desired. And we think the legal fraternity may be congratulated upon having at last, and after so many years of waiting, a complete and satisfactory annual digest.

MILLS' CONSTITUTIONAL ANNOTATIONS. A Compendium of the Law Especially Applicable to State Constitutions, and Adapted to the Constitution of Colorado and by Cross-reference to the Constitution of other States. By J. Warner Mills, of the Denver Bar. Chicago: E. B. Myers and Company, Law Book Publishers. 1890.

Though this book has been prepared by a Colorado gentleman, (and a very competent one at that), and with special reference to the constitution of Colorado, it has been made of equal value in all of the States having similar constitutional features. The fact that the Colorado constitution has been borrowed bodily in some instances, as in the case of Illinois, and largely in others, as in the cases of Pennsylvania, West Virginia, Missouri, Alabama, Arkansas, Georgia, Louisiana, Nebraska, and Texas, will afford an opportunity to practitioners in all of the States to note the decisions of the most important courts construing constitutional provisions. To the constitutional lawyer, the book is not only readable but is a compendium of constitutional law. It contains in full "Magna Charta" the great charter liberties of King John, the declaration of independence, the articles of confederation and perpetual union, the ordinance of 1787, with such opinions of courts as bear upon its features, the constitution of the United States with its amendments, the treaties ceding Louisiana and Texas, the treaty of Guadalupe Hidalgo, which contains so much of interest to practitioners in the Southwestern States and Territories, the organic act of Colorado passed by congress with all decisions of courts bearing thereon, the enabling act, by which colorado became a State, the address to the people of Colorado, and the election ordinance of 1875 by which that State was admitted to the Union. It contains also the general principles applicable to State constitutions, each provision being set out and followed by such decisions of the courts as bear upon its construction.

COMMENTARIES ON THE LAWS OF ENGLAND. Books 1, 2, 3 and 4. By Sir William Blackstone, Kt., one of the Justices of his Majesty's Court of Common Pleas. From the Author's Eighth Edition, 1778.

Edited for American Lawyers, By William G. Hammond, Dean of St. Louis Law School, and Lecturer on the History of Law at Boston University, the University of Michigan, and the State University of Iowa. With Copious Notes, and References to all Comments on the Text in the American Reports, 1787-1890. San Francisco: Bancroft-Whitney Company, Law Publishers and Law Booksellers. 1890.

From our earliest legal youth, we have been led to believe that Blackstone was one of the greatest lights that has illumined the legal world, and students everywhere are impressed with the superiority of his wisdom and the value of his writings. But a glance at the frontispiece of the first volume of this set of Blackstone, annotated by William G. Hammond, may naturally lead one to question whether that old tradition has not been exploded, and to believe that, at least in the minds of the publishers, Mr. Hammond, "is a bigger man" than old Blackstone, for we find a large cabinet photograph of the annotator, prepared by the skill of a modern photographer, and opposite it a small insignificant picture of the great commentator. We do not know whether the author or the publisher is guilty of this egregious piece of bad taste, but until further evidence is before us, we shall ascribe it to the mistaken enterprise and zeal of the publisher, rather than the gross immodesty of the annotator. And here is a good opportunity to enter our criticism of the practice on the part of some modern publishers of law books to send forth with their publications, pictures of the author. We do not think it in good taste and we doubt very much whether as a pecuniary investment it brings good results. Therefore we say, reform it altogether. An acquaintance with the editor of this set of Blackstone is sufficient to lead one to know that he is capable of intelligent and satisfactory work of the character indicated in this book. The positions which he has occupied as a lecturer and teacher of law at Boston University, the University of Michigan, the State University of Iowa, and now dean of the St. Louis Law School, is the strongest evidence of his qualifications for the task. It is sufficient to say that the notes throughout are exhaustive of the modern law on the subject of the text of the commentator, and display great learning, profound thought, and indefatigable industry. These features together with the fact that the latest American cases are cited in the notes hereto, will make it of more value than previous editions of Blackstone, published in this country. We have no doubt that this set of Blackstone will find its way into the schools, and be adopted by students everywhere. It may be of interest to state that the work is in the shape of four "pony" volumes, and are designed to belong to the set as issued by the Bancroft-Whitney Co.

THE GREEN BAG. A Useless but Entertaining Magazine for Lawyers, Edited by Horace W. Fuller. Vol. II, Covering the Year 1890. Boston Book Company, Boston, Mass

We acknowledge the receipt of a very handsome bound volume of this interesting periodical, covering the year 1890. Those who are not familiar with this new, but now well established, publication will find within its pages, much interesting matter. It does not pretend to deal so much with the practical questions of law as with those which might be termed of literary interest. A feature of the publication which adds interest is the practice of illustrating the principal articles. In this way we are furnished with pictures of many of the noted lawyers and judges. In this volume will be found interesting essays on women lawyers in the United States, with pictures of some of the most prominent of the fair practitioners, the law school of Cumberland University, of Tulane University, the Albany Law School, the law school of the University of Minnesota, the Supreme Court of Canada with portraits of some of its most prominent past and present members, the New York court of appeals very handsomely illustrated, and the Supreme Courts of Michigan, Connecticut, New Hampshire and Rhode Island. In addition to this, many readable articles of one kind and another on subjects of interest to the cultured lawyer.

BOOKS RECEIVED.

THE AMERICAN AND ENGLISH ENCYCLOPÆDIA OF LAW, Compiled under the Editorial Supervision of John Houston Merrill, Late Editor of the American and English Railroad Cases, and the American and English Corporation Cases. Vol. XIV. Northport, Long Island, N. Y.: Edward Thompson Company, Law Publishers. 1890.

A TREATISE ON THE LAW OF CITIZENSHIP, In the United States, Treated Historically by Prentiss Webster, of the Boston Bar. Albany, N. Y.: Matthew Bender, Law Book Publisher. 1890.

HUMORS OF THE LAW.

NOT very long ago, a member of the bar in Iowa, during the progress of a case, where, upon preliminary examination, he was defending a man charged with obtaining property under false pretenses, made two such remarkable blunders that they ought to be preserved in cold type. During the course of his argument, he found it necessary to refer to the principle that a criminal intent is a necessary ingredient to every crime. After dilating upon this at some length, and insisting that this was not only the law now, but had been the rule under the old English law back to the earliest times, our friend finally wound up his discussion upon this proposition, and brought down the house, by most vigorously asserting that the principle for which he was contending was as old as the statutes of old Mortmain himself. Before the justice and attorney on the other side had fairly recovered from this, the same lawyer, in the process of the same argument, found it necessary to read from Jacob's Fisher's Digest an extract which refers to *choses in action*. When he reached this phrase, our friend stopped and took occasion to state to the justice, that he had not had the benefit of a liberal education, and was not entirely sure that he knew what the phrase in question meant, but supposed that the meaning of *choses in action* was, that the party in question had his choice between several different kinds of actions. No further explanation was necessary. The foregoing is a strictly correct account of what actually took place in the practice of one of the present subscribers for the JOURNAL.

Old Judge Fernald, of Santa Barbara, has the reputation of being the politest man in California. He never loses an opportunity to doff his hat or to offer some slight attention to wayfaring men and women. One day as he was about to take the train for San Francisco, he reached the rear steps of the last car just as they were approached by a young priest.

"After the cloth," said the chivalric judge, stepping back with a courtly bow.

"Gray hairs have the preference," returned the priest with a splendid wave of his hand.

"The church always has precedence," retorted the judge, taking another backward step, hat in hand.

"The church follows in the footsteps of the fathers," replied the priest, bowing low and indicating the way to the steps.

The duel of politeness was not half through, neither yielded an inch, when the train pulled out, leaving both bowing and smiling on the platform.

CIRCUMSTANCES ALTER CASES.—Yesterday Judge Sayler, of the superior court, said a neat thing while on the bench and while the room was crowded with attorneys, who gave a shout of laughter as the honorable court, in a characteristic dry manner and without a particle of a smile, answered an attorney in a way that was almost unanswerable. The eloquent gentleman addressing the judge was endeavoring to gain an order prohibiting the unsecured creditors of a certain firm from filing answers and cross-petitions. Judge Sayler did not take kindly to the proposition, and was about to rule adversely, when the orator, making a last effort, said: "Your Honor, such a course would incumber the records with hundreds of pleadings. The unsecured creditors have ample opportunity to work out their rights under the receiver. Your Honor will pardon me, I know, if I remind you that in the celebrated case of —— v. ——, in which you appeared as counsel for the receiver, you, with great ability and learning and earnestness, endeavored to impress upon the court the necessity of adopting identically the same method which I am now presenting to your Honor." "Yes, I remember that case very well," instantly replied Judge Sayler; "but, you see, I was paid for doing that. I wasn't on the bench at that time."—*Cincinnati Times-Star.*

WEEKLY DIGEST

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Recent Decisions.

1. ADMINISTRATION—Ancillary Administrator.—Under Code Wash. T. 1881, § 1444, administration of the real estate of one deceased in another State is necessary, and the appointment of an administrator by the probate court of the county where the land lies, upon a petition setting out the death of decedent in another State, the probate of his will there, that there was no personal property in Washington belonging to the estate, and that there were no debts to the knowledge of the petitioner, is valid.—*Hanford v. Davies*, Wash., 25 Pac. Rep. 329.

2. ADMINISTRATOR—Estate of Wife.—Under Rev. St. Ill. ch. 3, § 18, which provides that administration shall be granted to the husband upon the estate of his wife if he will accept the same, and is not disqualified, a postnuptial contract by which a husband relinquishes all his rights and interest in his wife's estate does not justify the county court in refusing him letters of administration on her estate, since his right to administer does not depend upon his interest in the estate, but upon the mandatory provision of the statute.—*Orear v. Crum*, Ill., 25 N. E. Rep. 1097.

3. APPEAL—Eminent Domain.—In condemnation proceedings, one H was allowed to file a petition alleging that before the proceedings she was owner of one of the lots in question, and conveyed the same to defendant's grantor; that at the time of the conveyance she was a minor; and that she had elected to disaffirm the conveyance; and praying that the damages assessed for such lot be paid to her, less the consideration received by her. The court adjudged that the entire compensation be paid to defendant: *Held*, that such judgment was, as to H, a final judgment from which a writ of error would lie.—*Hutchinson v. McLaughlin*, Colo., 25 Pac. Rep. 317.

4. APPEAL—Review.—Upon appeal from a decree in an equity suit to quiet title, the material question was as to the validity of certain attachment proceedings under which the property in question was sold: *Held*, that in the absence of a transcript of the record in such proceedings, the appellate court would adopt as correct the conclusions of the trial judge as to their regularity.—*Kester v. Jewell*, Colo., 25 Pac. Rep. 315.

5. APPEAL—Service of Notice.—Construction of the Oregon statute providing for service of notice of an appeal upon the attorney of a party absent from the State.—*Butler v. Smith*, Oreg., 25 Pac. Rep. 381.

6. APPEAL—Waiver of Right.—On appeal the court will receive evidence *dehors* the record to establish the fact that the appellant has waived his right to appeal by accepting the benefits of the judgment appealed from.—*Bolen v. Cumby*, Ark., 14 S. W. Rep. 926.

7. ARBITRATION AND AWARD—Misconduct of Arbitrators.—An award made by an arbitrator, or an umpire between two arbitrators, as to the amount of loss upon a stock of goods damaged by fire, without any examination of the goods themselves, but merely from bills, invoice books and inventories, is invalid.—*Hartford Fire Ins. Co. v. Bonner Mercantile Co.*, U. S. C. C. (Mont.), 44 Fed. Rep. 151.

8. ASSIGNMENT FOR BENEFIT OF CREDITORS.—Where a general assignment for the benefit of creditors is made before the issuing of an attachment against the assignor's property, and the only evidence as to the attaching creditor's debt is that it was an existing liability when the attachment issued, the legal conclusion is that the debt was subsequent in date of existence to the execution of the assignment.—*Southern Suspender Co. v. Von Borries*, Ala., 8 South. Rep. 367.

9. ASSIGNMENT FOR BENEFIT OF CREDITORS—Fraud.—A conveyance by a debtor of all his property not exempt from execution to a trustee, with a proviso that it shall be void if the debts provided for by it are paid as they mature, is an absolute conveyance for the payment of debts when it appears that some of the debts were past due when it was executed, and, not being executed in accordance with the assignment laws, is void as to general creditors of the debtor.—*Box v. Goodbar* Ark., 14 S. W. Rep. 925.

10. ASSOCIATION—Political Organizations—Members.—The right of a person, duly elected thereto, to sit as a new member of the Democratic county committee, a voluntary unincorporated political association, provided for by the constitution of the Democratic county organization, is one which the courts will not attempt to enforce.—*McKane v. Democratic General Committee of Kings County*, N. Y., 25 N. E. Rep. 1057.

11. ATTACHMENT— Grounds.—A debtor who conveys his property for the purpose of hindering and delaying his creditors, though with the intention of ultimately paying them, falls within the provision of Code Ga. § 3297, that, whenever a debtor shall sell or convey his property "for the purpose of avoiding the payment of his debts," an attachment may issue.—*Gray v. Blackwell*, Ga., 12 S. E. Rep. 362.

12. BANK EXAMINERS—Compensation.—Under the act of March 29, 1889, requiring banks, corporations, firms and individuals transacting a banking business to report their resources and liabilities to the auditor of public accounts, and providing for their yearly examination, the fees of bank examiners, appointed by the board of State officers under the act, are to be strictly in conformity to section 8 of the act, and any resolution or order of the board of State officers prescribing any other rule or rate of compensation is without authority and void.—*State v. Benton*, Neb., 47 N. W. Rep. 477.

13. BONDS—Interest Coupons.—Interest coupons attached to negotiable bonds are distinct and independent promises to pay the interest installments, and a recovery on one is no bar to a suit on another, though the latter was past due when the first action was brought.—*Butterfield v. Town of Ontario*, U. S. C. C. (N. Y.), 44 Fed. Rep. 171.

14. CARRIERS—Limiting Liability.—The shipper having expressly agreed to assume all risk of delay caused by any mob or strike or threatened violence to person or property, he cannot recover for delay occasioned by a strike and violence of such magnitude as to require the military forces of the government to overcome.—*Gulf, C. & S. F. Ry. Co. v. Gatewood*, Tex., 14 S. W. Rep. 913.

15. CARRIERS—Loss of Goods.—A carrier is liable for goods lost by the act of God after its refusal to deliver to the consignee on presentation of the bill of lading, though the goods were marked by number only, and the delivery was refused because the waybill giving the name of the consignee had not been received when the demand was made, and the contract exempted the carrier from liability for wrong carriage or delivery of goods marked by initials or numbers.—*Richmond & D. R. Co. v. Benson*, Ga., 12 S. E. Rep. 357.

16. CARRIERS—Negligence.—Where in an action by a passenger against a railroad company the negligence charged is the rapid running of a train over an imperfect track, it is competent to show the condition of the track over which the train had to pass to reach the point where the accident occurred.—*Jacksonville & S. E. Ry. Co. v. Southworth*, Ill., 25 N. E. Rep. 1093.

17. CARRIERS OF LIVE STOCK.— A railroad company, engaged in the transportation of horses from one State to another, which keeps them confined in a car for more than 28 consecutive hours, without unloading them for rest, water or food, in violation of Rev. St. U. S. § 4386, is guilty of negligence *per se*, and is liable, not only for the penalty provided in said section, but also for any damage or injury that may be thereby sustained by the owner of the stock.—*Nashville, C. & St. L. Ry. Co. v. Heggie*, Ga., 12 S. E. Rep. 363.

18. CHATTEL MORTGAGES — Acknowledgment.— The fact that the officer taking the acknowledgment of a chattel mortgage was the partner of the mortgagee, and negotiated the loan secured by the mortgage, does not render the mortgage fraudulent and void as to other mortgage creditors, when it is not shown that he was a party in interest to either the lien or the note.—*Brereton v. Bennett*, Colo., 25 Pac. Rep. 310.

19. CHATTEL MORTGAGES — Recording.— A chattel mortgage or bill of sale of personal property, not accompanied by an immediate delivery, and followed by an actual and continued change of possession of the property sold, mortgaged or assigned, is presumed to be fraudulent and void as against subsequent purchasers in good faith.—*Norton v. Pilger*, Neb., 47 N. W. Rep. 471.

20. COMMUNITY PROPERTY—Second Wife.—A husband died, leaving a second wife, and an unsettled estate held by him in community with the first wife, the value of which was greater than the community debts and expenses of administration, but less than the debts and expenses and a second wife's allowance: *Held*, that one-half of the excess of the estate over the community debts and expenses should be divided between the heirs of the first wife; the full amount of her allowance must then be paid to the widow, if it can be done, out of the entire remainder of the estate, and what remains, if anything, must be paid to the creditors, according to their respective priorities.—*Hoffman v. Hoffman*, Tex., 14 S. W. Rep. 915.

21. CONFLICT OF LAWS—Judgment in another State.—One who executes a bond in Maryland authorizing "any attorney of any court of record in the State of New York or any other State to confess judgment" against him, cannot be held to have in contemplation Laws Pa. 1805-6, p. 347, which provides that upon the application of the holder of an instrument "in which judgment is confessed, or containing a warrant for an attorney at law, or other person, to confess judgment," the prothonotary shall enter judgment according to the tenor thereof, without the agency of an attorney; and an entry of judgment thereon by a prothonotary in Pennsylvania, although valid there, cannot be the foundation of a judgment in Maryland.—*Grover & Baker S. M. Co. v. Radcliffe*, U. S. S. C. 11 S. E. Rep. 92.

22. CONSTITUTIONAL AND INTERNATIONAL LAW.—Who is the sovereign *de jure* or *de facto* of a territory is not a judicial but a political question, the determination of which by the legislative and executive departments of any government conclusively binds the courts.—*Jones v. United States*, U. S. S. C., 11 S. E. Rep. 80.

23. CONSTITUTIONAL LAW—Taxation.—*Held*, that Laws N. Y. 1885, p. 702, ch. 405, § 15, as to collection of taxes was not unconstitutional, as impairing the obligation of contracts, because it prescribed a shorter period within which actions might be brought, it being competent for the legislature to impose such shorter limitation provided it be reasonable.—*Wheeler v. Jackson*, U. S. S. C., 11 S. C. Rep. 76.

24. CONTRACTS—Consideration.—A bond and a mortgage of the separate real estate of a married woman were executed by her and her husband to secure to the mortgagees payment for goods which had been stolen from them by the husband and a nephew of the wife, and placed in the stock of a business carried on by the husband and wife, in the name of the wife, but managed by the husband; the wife having no knowledge of the criminal transactions: *Held*, that there was a good consideration for the obligations on her part; that the bond and mortgage were not void for duress because of threats to sue her for the value of the goods that had gone into her possession, or to prosecute criminally her husband and nephew.—*Weber v. Barrett*, N. Y., 25 N. E. Rep. 1068.

25. CONTRACTS—Construction.—*Held*, that a provision in a building contract that "no new work of any description done on the premises, nor work of any kind whatsoever, shall be considered as extras unless a separate estimate, in writing, for the same before it is commenced shall have been submitted by the contractor to the superintendent and proprietor, and their signatures obtained thereto" may be subsequently waived by the parties by parol.—*McLeod v. Genins*, Neb., 47 N. W. Rep. 473.

26. CONTRACT—Counties.—Ultra Vires.—Parties having obtained money belonging to the county cannot justify

their use of it by pleading that they acted by the authority of the county commissioners, and then refuse to account for it on the ground that the commissioners could not lawfully give them such authority. A contract entered into by the agents of a corporation, without authority, may not be enforced against the corporation so long as the contract remains executory; nevertheless, the other contracting party, being *sui juris*, and having reaped the benefit of the execution of such contract without interference, cannot plead the agents' want of authority to enter into the contract as a defense to relieve himself from accounting to the corporation *ex æquo et bono*.—*Rollins v. Board of Commissioners*, Colo., 25 Pac. Rep. 319.

27. CONTRACTS—Evidence of Usage.—In all contracts as to the subject-matter of which known usages prevail, the parties proceed on the tacit assumption of such usages, but commonly reduce into writing the particulars of their agreement, but omit to specify those known usages which are included as of course by mutual understanding.—*McCulsky v. Klosterman*, Oreg., 25 Pac. Rep. 366.

28. CORPORATIONS—Assessment of Stock.—After one-half of the capital stock of a private corporation in this State has been subscribed, and a board of directors elected, assessments may be legally made upon the stock so subscribed.—*Astoria & S. C. R. Co. v. Hill*, Oreg., 25 Pac. Rep. 379.

29. CREDITORS' BILL—Extent of Remedy.—Where a judgment creditor of a corporation has issued execution which is returned unsatisfied, he may, under Rev. St. Wis. § 3216, *et seq.*, sue the corporation for the equal benefit of himself and all other creditors who may come in to have it declared insolvent, to sequester all its property, to recover unpaid subscriptions from stockholders, to have a receiver appointed, to restrain the prosecution of actions wherein certain of the creditors have attached some of the property, to enjoin the sheriff from selling the same, and compel him to deliver it to the receiver.—*Ballin v. J. & E. B. Friend Lace Importing Co.*, Wis. 47 N. W. Rep. 516.

30. CRIMINAL LAW—Carrying Concealed Weapons.—Carrying a pistol in a covered basket on one's arm, not for the purpose of transportation only, but for convenience of use and access and to evade the law, is carrying a concealed weapon within Code Ga. § 4527.—*Boles v. State*, Ga., 12 S. E. Rep. 961.

31. CRIMINAL LAW—Larceny by Bailee.—A bailment takes place when any article of personal property is put into the hands of one for a special purpose, and it is to be returned by the bailee to the bailor, or delivered to some third person, when the object of the trust is accomplished. Where gold-dust was intrusted to the possession of another, to deliver to a third party in Portland, when the object of the trust would be accomplished, and, upon demand of such bailee for the property, he promised to deliver it, but, failing to do so upon the third demand, he denied having received it, and refused to account, *held*, that this was conversion.—*State v. Chew Muck You*, Oreg., 25 Pac. Rep. 355.

32. CRIMINAL LAW—Rape.—To establish the crime of rape on a woman not of unsound mind, and who has reached the age of consent, it must be proved, beyond a reasonable doubt, that there was actual resistance on her part, or that resistance was prevented by violence, or restrained by fear; opposition by mere words is not enough.—*Huber v. State*, Ind., 25 N. E. Rep. 904.

33. CRIMINAL LAW—Venue.—Under an indictment charging the commission of the crime specified in section 236 of the Penal Code, in a certain county on the 3d day of April, 1886, it would be competent for the State to show that the crime was committed in an adjoining county, if committed within 100 rods of the line dividing said counties, on the 26th day of February previous.—*State v. Masteller*, Minn., 47 N. W. Rep. 541.

34. CRIMINAL PRACTICE—Arraignment.—If upon the arraignment the defendant be allowed a day to plead or to answer the indictment, he may, before otherwise pleading thereto, move to set it aside in answer to the arraignment; and, when such time is allowed to the defendant by the court, section 1315, Hill's Code does not preclude him from making the motion at any time before pleading.—*State v. Pool*, Oreg., 25 Pac. Rep. 375.

35. CRIMINAL PRACTICE.—Sufficiency of allegations as to time and the offense charged in an information under the statute providing punishment for acting as private watchman or detective without permission of police commissioners.—*State v. Bennett*, Mo., 14 S. W. Rep. 865.

36. DEATH BY WRONGFUL ACT—Dependency of Mother.—Under Act Ga. Oct. 27, 1887, amending Code Ga. § 2971, relating to the recovery of damages in cases of homicide and extending the right to recover to the mother or father for the homicide of a child upon whom she or he might be dependent, or who contributed to her or his support, in cases where the child left neither wife, husband, nor child, it is not necessary for recovery by a mother that she be wholly dependent on such child for support.—*Daniels v. Savannah, F. & W. Ry. Co.*, Ga., 12 S. E. Rep. 365.

37. DEED—Rule in Shelley's Case.—Under the rule in Shelley's Case, the fee passes to the first taker by a deed, by which a son conveys to his mother, "for and during her natural life-time," certain lands, "to have and to hold" "during the term of her natural life, and to descend to her heirs in equal portions, the maker of this deed included.—*Taney v. Fehnley*, Ind., 25 N. E. Rep. 882.

38. DESCENT AED DISTRIBUTION—Rights of Adopted Child.—Under Acts Tenn. 1851-52, ch. 338, § 2, providing that an adopted child shall have the rights of a child, as if born the child of the adopting parent, and shall be capable of inheriting and succeeding to the latter's real and personal estate as heir and next of kin, the act of adoption does not make the adopted child the heir or next of kin of children born to the adopting parent.—*Helms v. Elliott*, Tenn., 14 S. W. Rep. 930.

39. DOWER—Release to Husband.—Section 2869, Hill's Code, which provides that when property is owned by either husband or wife, the other has no interest therein which can be made the subject of contract between them, includes the wife's dower in the husband's lands and husband's estate by courtesy in the wife's lands, and therefore a conveyance or release to the husband, by the wife, of her inchoate right of dower in his lands, is a nullity.—*House v. Fowle*, Oreg., 25 Pac. Rep. 376.

40. EJECTMENT—Judgment.—A judgment in ejectment that plaintiff recover of defendant "fraction No. 12 a part of S. E. one-fourth and N. E. one-fourth of section 16, T. 4, R. 24, containing 34.75 acres," which description follows that in the declaration, is not void on its face for uncertainty; and evidence, such as diagrams, surveys, or plats, may be received, from which the exact limits and boundary line of "fraction No. 12" may be ascertained.—*Carlisle v. Killebrew*, Ala., 8 South. Rep. 355.

41. EVIDENCE—Collateral Matter.—Under a plea of payment in an action on a note, defendant introduced in evidence a check executed by him to plaintiff, which he testified was given and received in part payment of the note, *held* that testimony of plaintiff that such check was received in part payment of another note, which he had thereupon surrendered to defendant, was admissible, without proof of loss of the note, or notice to produce it; the note being merely collateral to the issue.—*Coonrod v. Madden*, Ind., 25 N. E. Rep. 1102.

42. EVIDENCE—Custom and Usage.—In a suit for a loss by fire communicated from a building used by defendant for keeping oils, which are alleged to have been ignited through the negligence of defendant, evidence that another engaged in the same business kept gasoline, benzine, and naphtha in small quantities only is not competent.—*Standard Oil Co. v. Swan*, Tenn., 14 S. W. Rep. 928.

43. EVIDENCE — Government Documents. — Though

certified copies of the books and accounts of the treasury department are by statute made evidence in favor of the government in actions against alleged delinquents, they are not conclusive, and, if a reply is made thereto, the case is to be decided on all the evidence.—*United States v. Young*, U. S. C. C. (N.Y.), 44 Fed. Rep. 168.

44. EVIDENCE AT FORMER TRIAL.—Testimony given at a former trial by a witness not shown to be dead, or beyond the jurisdiction of the court, is not admissible against the one by whom he was sworn, though his testimony was then acquiesced in, and not contradicted, the facts sworn to not being in the personal knowledge of the party by whom the witness was introduced.—*McElmurray v. Turner*, Ga., 12 S. E. Rep. 359.

45. FALSE IMPRISONMENT—Probable Cause.—The voluntary discontinuance of a prosecution does not raise a presumption of malice, nor put on the defendant, in a suit for malicious prosecution, the burden of showing probable cause.—*Joiner v. Ocean S. S. Co.*, Ga., 12 S. E. Rep. 361.

46. FEDERAL OFFENSE—Postal Laws—Embezzlement of Letters.—Though under Rev. St. U. S. § 5467, "embezzling a letter" and "stealing its contents" are separate offenses, and may be charged as such, the offenses are of the same grade and subject to the same penalty, and hence they may both be charged in a single count of the indictment, stating the whole transaction as a single offense, when both acts are committed by the same person at the same time, and constitute a single continuous act.—*United States v. Byrne*, U. S. D. C. (Mo.), 44 Fed. Rep. 188.

47. FRAUD—Decree.—A husband conveyed land to his wife in fraud of his creditors. The wife refusing to reconvey, he incited a judgment creditor to file a bill to set aside the wife's title, and, by fraudulent contrivance, prevented the process in the chancery proceeding being served on the wife. In that procedure he became the purchaser at the sheriff's sale: *Held*, that the decree and sale, so far as the husband was concerned, would be set aside at the instance of the wife.—*Stillwell v. Stillwell*, N. J., 20 Atl. Rep. 960.

48. FRAUDULENT CONVEYANCES—Bona Fide Holder of Mortgage.—Though a note was fraudulently given to create a fictitious debt, a mortgage to secure it given by the maker of the note to an indorsee, who received the note in good faith and before maturity as security for a debt due from the payee, and further advances made to him, is valid as against creditors.—*Riggon v. Wolf*, Ark., 14 S. W. Rep. 922.

49. FRAUDULENT CONVEYANCES—Evidence.—In an action involving the validity of the sale of a stock of goods as to the seller's creditors, a piece of promissory note signed by the seller is admissible in corroboration of the purchaser's testimony that the seller had been indebted to her for some time before the purchase of the goods, for which indebtedness he had executed his promissory notes; that these notes were surrendered to the seller at the time of the sale as a part of the purchase price, and by him torn up; and that the purchaser had picked up the piece offered in evidence.—*Butler v. Howell*, Colo., 25 Pac. Rep. 313.

50. HOMESTEAD—Minor Children.—Under Const. Ark. 1874, art 9, § 3, giving a homestead exemption to any resident of the State who is married, or the head of a family, the land of the wife occupied as a home by her husband and the family is her homestead.—*Thompson v. King*, Ark., 14 S. W. Rep. 925.

51. HUSBAND AND WIFE—Contract.—A married woman executed her notes for rent under a lease to her of a farm, which her son-in-law had previously applied to rent and had failed to obtain, being financially irresponsible, whereupon she had taken the lease, the credit being given to her. The negotiations were conducted by him, the son-in-law, and it was known to the lessors that he was to occupy the farm. He occupied it without paying rent to her: *Held*, that she was liable on the notes, and was not a mere surety, and exempt under the Indiana statute, the transaction not appearing to have been intended as an evasion of the statute.—*Crisman v. Leonard*, Ind., 25 N. E. Rep. 1101.

52. HUSBAND AND WIFE—Rights of Property.—Two judgments were recovered on the same day against a husband, and, on one of them, execution was levied on an undivided two-thirds of certain land owned by him, and a sale made under it. After the levy of this execution, an execution on the other judgment was levied upon all the land, and sale made under it also: *Held*, that, as the Indiana act of 1875 vests in the wife an interest in one-third of her husband's real estate, against his creditors, her one-third interest cannot be divested by a sale upon a judgment against the husband in any manner; that, therefore, the sale under the first execution covered all the judgment debtor's interest, even if the levy on and sale of an undivided two-thirds was not strictly regular.—*Ribelin v. Peugh*, Ind., 25 N. E. Rep. 1103.

53. HUSBAND AND WIFE—Use of Wife's Money.—Where a wife's funds are paid by her directly to her husband, or to his creditors, and are used by him in his business, with her knowledge and consent, and without any statements of account being ever demanded or received by her, no constructive trust arises in favor of her heirs, since the presumption is that the transaction was a gift.—*Reed v. Reed*, Ill., 25 N. E. Rep. 1095.

54. INSURANCE—Insurable Interest.—A stockholder of a steamboat company has an insurable interest in its steamers.—*Riggs v. Commercial Mut. Ins. Co.*, N. Y., 25 N. E. Rep. 1058.

55. INSURANCE—Premature Action.—Where an insurance policy stipulates that the loss shall not be payable till 60 days after proof of loss, an action commenced 58 days after proof of loss is premature, unless the company has absolutely refused to pay the loss.—*Cascade Fire & Marine Ins. Co. v. Journal Pub. Co.*, Wash., 25 Pac. Rep. 331.

56. INSURANCE COMPANIES—Right to Do Business.—Under Acts Tenn. 1875, ch. 109, and Acts Tenn. 1887, ch. 187, a purely mutual fire insurance company cannot be licensed to do business in the State, though it has in its advance premium fund more than $200,000, of which $100,000 is in United States bonds, and the commissioner of insurance may be satisfied that the company is entirely solvent.—*Mutual Fire Ins. Co. v. House*, Tenn., 14 S. W. Rep. 927.

57. INTOXICATING LIQUORS—Constitutionality of Acts—Act Md. 1890, ch. 343, prescribing a new system for the regulation of the sale of liquor in the city of Baltimore by the establishment of a board of commissioners, with power to grant retail licenses only to citizens of the United States of temperate habits and good moral character who shall have complied with all the requirements of the act, is a valid exercise of the police power of the State, and is not in conflict with Const. U. S. 14th Amend. § 1, providing that no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor deny to any person within its jurisdiction the equal protection of the laws.—*Trageser v. Gray*, Md., 20 Atl. Rep. 905.

58. INTOXICATING LIQUORS — Original Packages. — Where several bottles of liquor, each bottle separately wrapped in paper, labeled "Original Package," and marked with the name of the importer, are placed in an open box, and shipped therein into the State, the box is the original package.—*Keith v. State*, Ala., 8 South. Rep. 353.

59. JUDICIAL SALE.—A sale of real estate barring the equity of redemption cannot be decreed when the bill contains no application to bar redemption.—*Turner v. Argo*, Tenn., 14 S. W. Rep. 930.

60. JUDGMENT—Collateral Attack.—A judgment of a court of this State having jurisdiction of the parties and subject-matter cannot be attacked collaterally for fraud *aliunde* the record by the parties or privies.—*Morrill v. Morrill*, Oreg., 25 Pac. Rep. 362.

61. JUDGMENT — Non-resident — Appearance.— Relief against a judgment rendered against one not served

with process, on the unauthorized appearance of an attorney in his name, is to be sought by motion in the case in which such appearance was entered, and not by an equitable action.—*Vilas v. Plattsburgh & M. R. Co.*, N. Y., 25 N. E. Rep. 941.

62. JUDGMENT—Recitals.—Rev. St. Mo. 1879, § 3562, provides for service on a non-resident by some person competent to testify by whose affidavit or deposition the service is to be proved. The record disclosed a service by a sheriff of another State not proved by his affidavit or deposition: *Held*, that a general recital in the judgment that notice "was duly served on the defendant" is limited to the specific method of service disclosed by the record, and that being insufficient no jurisdiction is acquired.—*Higgins v. Beckwith*, Mo., 14 S. W. Rep. 931.

63. JUDGMENT—Res Adjudicata.— In a suit to quiet title to a parcel of land, the owner of an adjoining parcel was made a party defendant, and the boundary between them was established by the decree quieting the title, and forever restraining the defendants from setting up title to the land: *Held*, that this judgment precluded such adjoining owner and those claiming under him from setting up a different boundary under an earlier survey between the original owners.—*Satterwhite v. Shirley*, Ind., 25 N. E. Rep. 1100.

64. LANDLORD AND TENANT—Injunction.—A gas company which had leased and is using natural gas wells is entitled to an injunction against the lessor restraining him from interfering therewith, since such interference is likely to result in irreparable injury.—*Citizens' Natural Gas Co. v. Shenango Natural Gas Co.*, Pa., 20 Atl. Rep. 947.

65. LIFE INSURANCE—Forfeiture of Policy.—A life insurance company, having requested the payment of an assessment, and assured the policy-holder that if it was paid he would remain a member of the company, cannot thereafter insist upon a forfeiture of the policies and demand a certificate of health before reinstatement because insured had not paid the assessment at a date prior to said request and assurance of the company.—*True v. Bankers' Life Ass'n. of Minnesota*, Wis., 47 N. W. Rep. 520.

66. LIMITATION OF ACTIONS—Recovery of Land.—An action for the recovery of the title or possession of lands, tenements, or hereditaments can only be brought within 10 years after the cause of such action shall have accrued. Civil Code, § 6.—*Fitzgerald v. Brewster*, Neb., 47 N. W. Rep. 475.

67. LIMITATIONS—Claims Against Decedents.—In 1880, there was no statute which fixed a limit of time within which a claim against the estate of a deceased person should be presented.—*In re Gragg's Estate*, Minn., 47 N. W. Rep. 543.

68. MANDAMUS—Clerk of Court.—By How. St. Mich. § 6592: *Held* that *mandamus* would not lie to compel the board of supervisors to audit and allow the clerk his fees and expenses for issuing subpœnas, as registered in chancery, to the owners of the land, though they were taxed as costs in the tax suits.—*Sherman v. Board Sup'rs Sanilac County*, Mich., 47 N. W. Rep. 513.

69. MANDAMUS—Parties.—When the question is one of public right, and the object of the *mamdamus* is to enforce the performance of a public duty, it is sufficient for the relator to show that he is a citizen of the county, and as such is interested in the execution of the laws.—*State v. Grace*, Oreg., 25 Pac. Rep. 382.

70. MANDAMUS—Railroad Companies.—*Mandamus* proceedings to compel a railroad company to reconstruct a public road which it has taken may be begun by the road commissioners acting officially without the consent of the attorney general.—*Commonwealth v. New York, P. & O. R. Co.*, Penn., 20 Atl. Rep. 951.

71. MASTER AND SERVANT—Fellow-servant.—A laborer engaged in loading a vessel, and placed at the hatchway to give warning when bales were thrown down, and those engaged in throwing down the bales, are fellow-servants of a laborer employed to receive and store them below.—*Ocean S. S. Co. v. Cheney*, Ga., 12 S. E. Rep. 351.

72. MASTER AND SERVANT—Injuries to Servant.—A brakeman on defendant's road was injured by coming in contact with a highway bridge across the railroad track, while he was riding on top of a freight-car in the night-time: *Held*, that defendant could not complain of the court's refusal to permit it to give in evidence the contents of its bulletin boards, and placards posted in the cabooses of its freight trains, showing the location of low bridges, where a copy of such placards was subsequently admitted in evidence.—*Louisville, etc. R. Co. v. Hall*, Ala., 8 South. Rep. 371.

73. MASTER AND SERVANT—Limit of Recovery.—Under the provisions of Code Ala. § 2591, that in certain cases an employer is liable in damages for the death of an employee, recovery is limited to the pecuniary loss.—*Louisville & N. R. Co. v. Orr*, Ala., 8 South. Rep. 360.

74. MASTER AND SERVANT—Negligence.—It is well settled that a wrong-doer is liable for an injury which resulted as the natural and probable consequences of his wrongful act, and which he aught to have foreseen in the light of surrounding circumstances.—*Hartvig v. N. P. Lumber Co.*, Oreg., 25 Pac. Rep. 358.

75. MASTER AND SERVANT—Negligence.—Under the provisions of Code Ala. § 2590, contributory negligence cannot be imputed to the employee for continuance in the service after discovering a defect, unless he fails to give information within a reasonable time, or unless injury is so imminent that a prudent man would not continue in the service under like circumstances.—*Highland Ave. & B. R. Co. v. Walters*, Ala., 8 South. Rep. 357.

76. MEASURE OF DAMAGES—Evidence.—In an action for personal injuries, where plaintiff claims damages for permanent injuries, it is proper to charge that no "fixed rule exists for estimating this sort of damages," and to leave the measure of such damages to the jury under all the circumstances of the case.—*Richmond & D. R. Co. v. Allison*, Ga., 12 S. E. Rep. 352.

77. MINING CLAIMS—Parties.—An interest claimed by an intestate in a mining claim at the time of his death is an interest in real estate, and descends to his heirs, who alone can maintain an action to quiet title thereto. The right to maintain such action is not conferred upon the administrator of the intestate by Rev. St. U. S. §§ 2322, 2324.—*Keeler v. Trueman*, Colo., 25 Pac. Rep. 311.

78. MORTGAGES — Description.—A mortgage of a specifically described tract of land in which is a vein or lode of metal on which some mining has been done, with all the mines, minerals, mining rights, privileges, and appurtenances belonging or appertaining to the same, does not cover an undeveloped portion of the lode contained in land adjoining the tract described, and in which also is the *situs* of the lode.—*Staples v. May*, Cal., 25 Pac. Rep. 346.

79. MUNICIPAL BONDS—Internal Improvements.—A beet sugar manufactory which does not manufacture sugar from beets for toll, although propelled by water power, is not within legislative control by virtue of any law of this State, and is therefore held not a work of "internal improvement," within the meaning of the constitution or statute.—*Getchell v. Benton*, Neb., 47 N. W. Rep. 468.

80. MUNICIPAL CORPORATION—Street Assessments—Lien.—Under Laws Cal. 1885, p. 147, §§ 7, 8, 9, the liability of each lot is a separate cause of action, and foreclosure of the lien upon one lot will not prevent a subsequent action against the same person to foreclose on another lot owned by him.—*Gillis v. Cleveland*, Cal., 25 Pac. Rep. 351.

81. MUNICIPAL CORPORATION—Ultra Vires.—The charter of St. Louis, art. 3, § 26, par. 10, declaring that "every person so committed to the work-house * * * shall be required to work for the city, * * * and * * * shall be allowed * * * 50 cents per day for each day's work, on account of said fine and costs," neither permits nor forbids the city to hire the work-house prison-

ers to a contractor at a fixed price per day, for its own benefit, and hence such a contract is *ultra vires*, but not illegal.—*City of St. Louis v. Davidson*, Mo., 14 S. W. Rep. 825.

82. MUTUAL BENEFIT INSURANCE—Evidence.—In an action on a mutual benefit certificate, made part of the petition, when defendant pleads a general denial, and the benefit certificate is not introduced in evidence, a judgment for plaintiff will be reversed for want of evidence.—*Knights of Honor v. Fortson*, Tex., 14 S. W. Rep. 922.

83. NATIONAL BANKS—Taxation of Stock.—Under Rev. St. U. S. § 5219, a State may tax national bank shares held by its corporate or individual citizens as an investment, subject to the restriction that the tax shall not exceed the burden upon similar property in the State.—*First Nat. Bank of Wilmington v. Herbert*, U. S. C. C. (Del.) 44 Fed. Rep. 158.

84. NEGLIGENCE—Dangerous Premises—Evidence.—In an action for the wrongful death of a child between five and six years old, it is not admissible for the attending physician, who has already stated that the child was frail and weak, to further testify whether in his opinion the child would have survived the injury had it been a healthy one.—*Ilwaco Ry. & Nav. Co. v. Hendrick*, Wash., 25 Pac. Rep. 335.

85. NEGLIGENCE—Defective Tools.—A "swage" in a railroad shop had become battered and burred, by reason of which a flake of iron was knocked off, and struck in the eye an employee, who had gone to the shop to get a bolt needed in his work. It was shown that the implement was in "average condition," though one witness testified that it was not proper for use, and should have been repaired: *Held*, that there was no evidence of negligence.—*McNally v. Savannah F. & W. Ry. Co.*, Ga., 12 S. E. Rep. 351.

86. NEGOTIABLE INSTRUMENT—Evidence.—In an action on a note made by one partner in the firm name, payable to himself, and by him transferred to plaintiff, who claims to be a *bona fide* purchaser for value, which is denied by defendant, the other partner, who maintains that there was no consideration for the note, and that it was executed in fraud of his rights with the connivance of plaintiff, it is competent for defendant to show, on plaintiff's cross-examination, whether or not he ever asked defendant for the money, especially when it appears that, after the time when plaintiff claims to have bought the note, he paid defendant several large sums of money without mentioning the note, which was then past due.—*Carpenter v. Greenop*, Mich., 47 N. W. Rep. 509.

87. OFFICE AND OFFICERS—Appointments—Discharged Soldiers.—If sections 2474, 2475, Comp. Laws, confer any right upon honorably discharged soldiers of the late war, in appointment to office, not common to all legal voters in general, the fact that the applicant for appointment was an honorably discharged soldier of the late war must be made known to the appointing power at the time and place of appointment. If not, the appointing power has a right to treat all applicants as standing on an equal footing before the law, and a choice made by it, under such circumstances, must be considered binding.—*Thomas v. Commissioners of Beadle County*, S. Dak., 47 N. W. Rep. 529.

88. PLEADING—Rescission of Contract.—In an action on a note, where the answer alleges that defendant was induced to execute it by fraud, and that the consideration received by him was without value, an averment of an offer to rescind the contract is not necessary.—*Citizens' Bank v. Leonhart*, Ind., 25 N. E. Rep. 1099.

89. POLICEMAN — Quo Warranto.— The position of policeman is not an "office" within section 21, providing that all officers appointed by the mayor or council shall, with certain exceptions, hold office till the ensuing May.—*People v. Cain*, Mich., 47 N. W. Rep. 484.

90. PRACTICE—Continuance.—The granting or refusing of a motion for a continuance of a cause rests in the sound discretion of the trial court, and its ruling will not be reversed, except for the most cogent reasons. The court below is apprised of all the circumstances of the case, and the previous proceedings therein, and is better able to decide upon the granting or refusing the application than an appellate tribunal. When the trial court exercises a reasonable, and not an arbitrary, discretion, its action will not be disturbed.—*Gaines v. White*, S. Dak., 47 N. W. Rep. 524.

91. PRACTICE—Service by Publication.—In an action to quiet the title to real estate, the summons having been served by publication, and judgment having been rendered after default on the part of defendants, the court may in its discretion, set aside the judgment and allow a defense to be made, although more than one year may have elapsed since the rendition of the judgment.—*Waite v. Coaracy*, Minn., 47 N. W. Rep. 537.

92. PUBLIC LANDS—Entry for Another's Use.—A party cannot enter public lands under the pre-emption laws in trust for the use and benefit of another, and the court will not decree that an entry was so made, or that the title acquired thereunder by the pre-emptor from the government inured to the benefit of any other person.—*Robinson v. Jones*, Neb., 47 N. W. Rep. 480.

93. RAILROAD COMPANIES—Foreclosure of Mortgage.—A decree for the judicial sale of a railroad declared that "any purchaser * * * shall take * * * subject to all unpaid purchase money for any of the lands or rights of way herein referred to, as well as also all unpaid claim of land owners for damages for property taken, injured, or destroyed in the construction of the railroad:" *Held*, that the purchasing company was not liable upon a judgment rendered prior to the sale, against the old company for a trespass in entering upon plaintiff's land, and constructing its road without leave.—*Campbell v. Pittsburgh & W. Ry. Co.*, Penn., 20 Atl. Rep. 949.

94. REMOVAL OF CAUSES—Separable Controversy.—In a suit in the nature of a creditors' bill, brought in a State court by citizens of the State against a railroad company, also a citizen of the State, the trustee, under a mortgage on the railroad, who was a citizen of another State, intervened: *Held*, that there was no separable controversy within the removable act of 1888, § 2, providing that one of several defendants may remove any suit, in which "there shall be a controversy, which is wholly between citizens of different States, and which can be fully determined as between them."—*In re San Antonio & A. P. Ry. Co.*, U. S. C. C. (Tex.), 44 Fed. Rep. 145.

95. REPLEVIN—Damages.—In replevin by a chattel mortgagee against an attaching creditor of the mortgagor the recovery is properly for the full value of the property, even though plaintiff's interest may be less.—*Stevenson v. Lord*, Colo., 25 Pac. Rep. 313.

96. REPLEVIN—Demand.—Where the plaintiff has delivered property to defendant, and defendant merely detains it, it is necessary that the plaintiff first make demand for it to maintain replevin; and, in such case, a refusal, in order to excuse defendant, must be a qualified refusal, based upon reasonable grounds. It must not be absolute; otherwise, it will be conversion, unless there is established an adverse right to immediate possession.—*Nunn v. Home Ins. Co.*, Neb., 47 N. W. Rep. 467.

97. SALE—Change of Possession.—Where personal property, capable of an actual delivery, has been sold while in the possession of the vendor, or under his control, such delivery must be made, and must be followed by a continued change of possession, or the sale will be presumed fraudulent and void as against the vendor's creditors.—*Lathop v. Clayton*, Minn., 47 N. W. Rep. 544.

98. SALE—When Title Passes.—In the sale of personal property, where there has been a complete delivery of the property in accordance with the terms of sale, and nothing remains to be done, in relation to the property, to effect the transfer, the title passes, although there remains something to be done in order to ascertain the total quantity or value of the goods at the price speci-

fied in the contract.—*Barr v. Borthwick*, Oreg., 25 Pac. Rep. 360.

99. SCHOOLS—Discharge of School Teachers.—A public school teacher engaged for a specific term, who is discharged without cause, need not allege or prove, as a condition precedent to a recovery of his salary for the whole term, a compliance with Gen. St. Colo. § 3077, providing that any person aggrieved by the decision of a board of directors may appeal within 30 days to the county superintendent.—*School-Dist. No. 3 v. Hale*, Colo., 25 Pac. Rep. 308.

100. SPECIFIC PERFORMANCE—Diligence.—A contract to convey land which provides for the payment of the purchase price within 60 days from its date, "otherwise this agreement to be null and void," clearly shows the intention of the parties to make time the essence of the contract; and the failure of the vendees or their assignee to make or tender payment within the specified time precludes them for maintaining an action for the specific performance of the contract.—*Martin v. Morgan*, Cal., 25 Pac. Rep. 350.

101. SPECIFIC PERFORMANCE—Mutuality.—Where the owner of land signs an agreement to convey it to plaintiff if he will pay $200 at a given time, the expressed consideration of the contract being 50 cents, the election of plaintiff to treat the contract as binding, and to enforce, gives it such mutuality as will support a suit for specific performance, though plaintiff does not sign the contract himself.—*Ross v. Parks*, Ala., 8 South. Rep. 368.

102. STATE—Removal of Causes.—The effect of the admission of a part of the territory of Dakota as the State of South Dakota, and the erection of federal courts therein (Act Cong. approved Feb. 22, 1889), was *ipso facto* to extinguish the territorial government, and its territorial courts.—*Wing v. Chicago & N. Ry. Co.*, S. Dak., 47 N. W. Rep. 530.

103. STOCK AND STOCKHOLDERS — Rescission. — An action by a stockholder against the corporation and its president to rescind the contract of purchase of stock, and to recover the price paid, on the ground of fraud practiced on her by the president in inducing her to take the stock, is governed by Code Civil Proc. N. Y. § 382, subd. 5, providing that the statute of limitations shall not run against "an action to procure a judgment, other than for a sum of money, on the ground of fraud," in a case formerly cognizable in chancery, until the discovery of the fraud by plaintiff, and it is not governed by the six-year limitation provided by subdivision 3 of that section.—*Bosley v. National Machine Co.*, N. Y., 25 N. E. Rep. 990.

104. SUBROGATION—Mortgage Sale.—The purchaser at a sheriff's sale on a void foreclosure of a mortgage is subrogated to the interest of the mortgagee, and may himself foreclose.—*Dutcher v. Hobby*, Ga., 12 S. E. Rep. 356.

105. TAXATION—Assessment.—The unauthorized alteration by assessor of tax-payer's return for assessment, made according to original survey, to a description in new survey, whereby acreage of lots returned are decreased, and lots are added to cover balance, and assessed to unknown, without notice, and a payment on lots as returned, with offer to pay all taxes due, invalidates sale of such added lots.—*Lewis v. Withers*, U. S. C. C. (Miss.), 44 Fed. Rep. 165.

106. TAXATION — Building Association. — Mortgages held by mutual building associations, incorporated under our general statutes, *held* subject to taxation, the stock of the association not having been taxed.—*State v. Redwood Falls Building & Loan Ass'n*, Minn., 47 N. W. Rep. 540.

107. TAXATION—Exemption.—Act Miss. March 8, 1888, imposing certain privilege taxes on banks in lieu of all other State, county, and municipal taxes, was expressly repealed by Act. Feb. 24, 1890, providing that banks should pay *ad valorem* taxes. On the first day of February, 1890, plaintiff bank paid for that year the privilege tax provided for by act of 1888: *Held*, that the assets of the bank could also be assessed for an *ad valorem* tax for that year under the act of February 24, 1890, as it was competent for the legislature to impose both taxes.—*Board Sup'rs Attala County v. Kelly*, Miss., 8 South. Rep. 376.

108. TRIAL—Verdict.—If the proof of a fact is so preponderating that a verdict against it would be set aside by the court as contrary to evidence, then it is the duty of the court to direct a verdict in favor of the party having this preponderance.—*Peet v. Dakota Fire & Marine Ins. Co.*, S. Dak., 47 N. W. Rep. 532.

109. TRUST—Evidence.—Sufficiency of evidence to justify the establishment of a resulting trust in favor of certain legatees in land conveyed to the widow and executrix, on the ground that she had paid for it with funds belonging to the estate.—*Burke v. Andrews*, Ala., 8 South, Rep. 369.

110. VENDOR AND VENDEE—Contract.—Time is the essence of a contract for the sale of land which provides for the payment of the purchase money in installments at specified dates, and for the execution of a good and sufficient deed by the vendor on the receipt of the final installment, and that, "in the event of a failure to comply with the terms hereof by the vendee, the vendor shall be released from all obligations in law or in equity to convey said property, and said vendee shall forfeit all right thereto."—*Woodruff v. Semi-Tropic Land & Water Co.*, Cal., 25 Pac. Rep. 354.

111. WATER AND WATER-COURSES—Estoppel.—*Held*, under the circumstances of the particular case, the plaintiff should not be permitted to set up her riparian interest so as to defeat the defendant's right to a certain portion of the water of Mill creek, where the diversion was made under a claim of title, and the defendant believed, and had reason to believe, that the claim was well founded, and the plaintiff stood by without asserting or making known her claim, while the defendant was expending large sums of money, and making extensive improvements under an honest and reasonable belief that it had the right to make such diversion, and without which its expenditures would prove a total loss.—*Curtis v. La Grande Hydraulic Water Co.*, Oreg., 25 Pac. Rep. 378.

112. WILLS—Restraint of Marriage.—Testator devised to his wife all his real estate "after paying all my debts and legal charges, and paying out to my children the allowance hereafter made, so long as she remains my widow." There was no other devise of real property: *Held*, that the wife took the use of the real estate only during her widowhood, and that the condition in restraint of marriage was valid.—*Knight v. Mahoney*, Mass., 25 N. E. Rep. 971.

113. WILLS—Widow's Election.—Testator directed that his real and personal property should be converted into money, and placed at interest for his wife's use for life; at her death, certain specific legacies to be paid, and the balance to go to residuary legatees. The wife renounced the will, and elected to take under the law: *Held* that, for the purposes of the will this was equivalent to her death, and the remainders became immediately payable out of the part of the fund released by her election, as far as it would reach.—*In re Ferguson's Estate*, Penn., 20 Atl. Rep. 945.

114. WITNESS—Physicians.—Under 1 Saub. & B. Ann. St. Wis. p. 888, § 1436, providing that no physician can testify in a professional capacity unless he has received a diploma from some incorporated medical society or college, or is a member of the State or some county medical society, legally organized in the State, a physician's qualifications may be proved by his own oral testimony, without producing his diploma. — *McDonald v. City of Ashland*, Wis., 47 N. W. Rep. 434.

115. WITNESS—Transactions with Decedents.— Where the defense to a suit on a note is that it was procured by fraud, the payee's agents who were guilty of such fraud, if there was any, are "person having a direct interest in the event of the suit," within the meaning of Rev. St. Ill. ch. 51, § 2.—*Butz v. Schwartz*, Ill., 25 N. E. Rep. 1007.